Supreme Court, U. S.
FILED
MAY 16 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION ONE

DAVID SILVERTON
Attorney at Law
3600 Wilshire Boulevard, Suite 220
Los Angeles, California 90010
Telephone: (213) 381-7511
Attorney for Petitioner, Wayman O. Wilkes.

Westside Law Publishers Santa Monica, California (213) 451-1714

TOPICAL INDEX

Opinion Below 2

Jurisdiction 2

Questions Presented 2

A. Brief Factual Framework of the First Two Questions 2

B. Questions Within the Factual Framework set forth in "A," above. .....

C. Brief Factual Framework of the Third and Fourth Questions. 4

D. Questions Within the Factual Framework of "C," above. 4

Constitutional Provisions and Rule of Law Involved 5

Statement of the Case 6

Reasons for Granting the Writ 12

1. It is Important that this Court Extend the Constitutional Protection of the Fifth and Sixth Amendments of the Federal Constitution to the Numerous Situations Where a Non-Defendant Witness Is Induced to Testify with the Implicit, if not Expressed, Promise of Leniency if He Helps to Implicate the Defendant on Trial, Coupled with the Threat Implicit in the Pending Criminal Proceedings Against Him if He Does Not. 12

2. The Punishment of Petitioner for Violating an Ex Post Facto Law; and even more so, One that has been Repealed Prior to the Final Disposition of Petitioner's Case, Is an Injustice and Outrage Which Calls for an

Exercise of this Court's Supervisory Powers

Conclusion 20

APPENDIX

(The Appendix is printed separately herein.)

A Opinion of the Court of Appeal of the State of California, Second Appellate District, Division One (2, 11, 17, 18) 2

B Order Denying Hearing by the California Supreme Court (People v. Wilkes) (2, 11) 16

C California Health & Safety Code § 1310 (former) (4) 17

D Repeal of California Health & Safety Code § 1310 (former) (4) 18

E Amendment Six of the United States Constitution (5) 19

F Amendment Five of the United States Constitution (5) 20

G Article I, Sections 9 and 10, United States Constitution (5) 21

H Excerpts from Court of Appeal Opinion in People v. Silverton, 2d Crim. No. 28271 (11) 22

I Order Denying Hearing by the Supreme Court of the State of California after Judgment by the Court of Appeal (People v. Silverton) 24

J Notice of Petition for Writ of Certiorari to the United States Supreme Court (11) 25

K Transcript of Federal Court proceedings on May 9, 1978, United States District Court, Central District of California, Judge Francis J. Whelan, presiding (12, 16) 30

TABLE OF AUTHORITIES CITED

Cases

American Railway Express Co. v. Levee, 263 U.S. 19, 68 L. Ed. 140, 44 S.Ct. 11 2

Bell v. Maryland, 378 U.S. 336, 12 L. Ed.2d 822, 84 S. Ct. 1814 (1964) 5, 6, 11, 19

Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) 13

In re Estrada, 63 Cal.2d 740, 48 Cal. Rptr. 172, 408 P.2d 948 18

Miranda v. Arizona, 384 U.S. 432, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) 12

Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543 (1923) 16

People v.Rossi, 18 Cal.3d 295, 34 Cal. Rptr. 64, 555 P.2d 1313 (1976) 18

People v. Silverton, California CA, No. 2d Crim. 28271 2, 7, 10, 14, 15

U.S. v. Schooner Peggy, 5 U.S. (1 Crauch.) 103, 2 L. Ed. 49 (1801) 19

Statutes

28 U.S.C. § 1257(3) 2

California Civil Code § 224(q) 6

California Government Code § 9608 18

California Health & Safety Code § 13 10 (former) 4, 6, 7, 10, 16, 17, 18

California Health & Safety Code § 1508 6

California Penal Code § 182.1 6

California Penal Code § 273(a) 6

United States Constitution

Article I, §§ 9 and 10	5, 18
Fifth Amendment	5, 12, 13, 15
Sixth Amendment	5, 12, 13, 15
Fourteenth Amendment	13

In the Supreme Court of the United States

October Term, 1977
No. _____

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Wayman Otis Wilkes, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, entered in the above entitled case on November 18, 1977.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, is unreported and is printed in Appendix "A" hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division I, was entered on November 18, 1977, affirming Petitioner's conviction dated April 29, 1975 (RT[1] 79-81). Thereafter on February 16, 1978, the highest State Court, the Supreme Court of California denied a timely filed Petition for Hearing.[2] Said denial is printed as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A. Brief Factual Framework of the First Two Questions:

Petitioner had pled guilty to conspiracy to commit various misdemeanors, a felony (RT 73); and had his sentence deferred by the trial judge until after the trial by the same judge (with a jury) of a co-defendant.

At the time of the plea, the trial judge admonished

---

[1]Abbreviations used in this brief are as follows: CT - Clerk's Transcript; RT - Reporter's Transcript; SCT - Clerk's Transcript in the case of *People v. Silverton*, Appellate 2d Crim. 28211; SRT - Reporter's Transcript in the case of *People v. Silverton*, Appellate Court No. 2d Crim. 28211; OP - Opinion of the Court of Appeal in this case which is appended hereto as Appendix "A."

---

[2]Where the highest State Court has jurisdiction to review a decision of a lower State Court, but refuses to do so, the time for filing an appeal extends from the date of refusal to review. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L. Ed. 140, 44 S. Ct. 11.

Petitioner "to cooperate in a reasonable and truthful manner with either side in the case should he be chosen to be called as a witness (RT 77). At co-defendant's trial the prosecution called petitioner as its witness and asked questions, over the objection of defendant, designed to elicit that the Petitioner had pled guilty to many of the same charges for which defendant was then on trial (SRT 1630, lines 5-17; 1680-1691).

Petitioner at first responded that he had only pled guilty to a misdemeanor, but thereafter throughout extended questioning by the prosecution admitted that he had pled guilty to the felony of conspiracy to commit various misdemeanors on the mistaken belief it was a misdemeanor (SRT 1826; 1890-2009).

During the aforestated extended questioning of Petitioner, the following pertinent events occurred in sequence:

(a) The prosecutor requested the trial judge to counsel the witness on the law of perjury (SRT 1890, lines 1-2); and stated that he felt that the witness was committing perjury (SRT 1893, line 28 to 1894, line 9).

(b) The trial judge stated that the response of the Petitioner "would certainly have some effect on the Court's thinking process as to what the defendant's state of mind is when I try to decide what would be the appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1891, lines 12-21.)

(c) Petitioner asked the trial judge: "Would it be advisable for me to have my attorney here?" The trial judge stated: "I don't think so at this particular moment." (SRT 1895, lines 2-14.)

Petitioner responded in the following manner to the question of the prosecution as to whether he felt his taking the witness stand "will affect your sentence?" "Yes" (SRT 1945, line 22).

B. Questions Within the Factual Framework set forth in "A," above:

(1) Whether Petitioner was denied his right under the Sixth Amendment to the Federal Constitution to have the assistance of counsel.

(2) Whether Petitioner was denied his right under the Fifth Amendment to the Federal Constitution not to incriminate himself.

C. Brief Factual Framework of the Third and Fourth Questions:

The opinion of the Court of Appeal of the State of California on page 8 thereof, third paragraph from the bottom (Appendix A, *infra*) correctly states:

> "The prosecution of Appellant Wilkes [Petitioner herein] for violation of former section 1310 of the Health and Safety Code . . . was commenced before the effective date of that section on January 1, 1974."

The opinion of the Court of Appeal of the State of California in the same paragraph from which the above quote is extracted, in the sentence following the aforequoted statement, goes on to say that former section 1310 (the offense with which Petitioner herein stands convicted) became effective on January 1, 1974, the same date it was repealed.

Said repeal had no "savings clause" [§ 1310 is printed in the attached Appendix "C," and its repeal in the attached Appendix D].

D. Questions Within the Factual Framework of "C," above.

(3) Whether the making of Petitioner's conduct prior to January 1, 1974, criminal by virtue of passing a law on

January 1, 1974, making it criminal, is an ex post facto law that denies Petitioner his rights under the Federal Constitution (Article I, Sections 9 and 10).

(4) Whether punishing Petitioner for violation of a criminal statute which is repealed before the conviction becomes final when the repeal has no clause providing for saving of its sanction against past transgressors, is contrary to "a universal common law rule" as applied by the United States Supreme Court in *Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed. 822, 826, 84 S. Ct. 1814.

CONSTITUTIONAL PROVISIONS AND RULE OF LAW INVOLVED

1. That part of the Sixth Amendment to the Federal Constitution giving the accused in all criminal prosecutions the right to have assistance of counsel for his defense. (Printed in full in Appendix "E.")

2. That part of the Fifth Amendment to the Federal Constitution providing that no person shall be compelled in any criminal case to be a witness against himself. (Printed in full in Appendix "F.")

3. Those parts of Article I, Sections 9 and 10 prohibiting the passage of an ex post facto law by either the Federal Government or a State. (See Appendix "G" for printing *in haec verba*.)

4. As to number "4," *supra*, of "Questions Presented":

> "[A] universal common law rule that when the legislature repeals a criminal statute . . . , this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not reached final disposition in the highest court authorized

to review it." *(Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S. Ct. 1814)." (18 Cal.3d 304).

STATEMENT OF THE CASE

On June 14, 1974, a 14-count indictment was filed against petitioner and co-defendant Ronald R. Silverton (there were other co-defendants also). (CT 1.) In this indictment, Petitioner was charged with violation of Section 182.1 of the *Penal Code* (Count I) (CT 1), violation of Section 224(q) of the *Civil Code* (Count VIII) (CT 11), violation of Section 1310 of the *Health & Safety Code* (Count IX) (CT 12), violation of Section 1508 of the *Health & Safety Code* (Count X) (CT 13), and violation of Section 273a of the *Penal Code* (Count XIV) (CT 17).

On September 13, 1974, petitioner joined in motions made by co-defendant Silverton to annul the indictment, for various reasons, and in a demurrer to the indictment, which raised, among other things, that Section 1310 of the *Health & Safety Code* was not in effect during the period, July 1, 1973, to December 31, 1973 (CT 37). These motions and the demurrer were denied in various hearings occurring from September 17, 1974, through September 30, 1974. (CT 38-47.)

A trial of the matter commenced on February 18, 1975, at which time, pursuant to a plea bargain, petitioner changed his plea to guilty to a modified Count I of the indictment. Count I charged violation of Section 182(1) of the *Penal Code*. The District Attorney stated to the Court that for purposes of the plea the People deleted two of the purposes and objects of the conspiracy contained in one of the first two paragraphs of Count I and the third paragraph

in Count I. The purpose of this omission was to remove all felonies as objects of the conspiracy and to leave only as the purpose and objects of Count I, misdemeanor paragraphs; one of which was Count IX, a violation of Section 1310 of the *Health & Safety Code* (RT 73). Part of the plea bargain was that the maximum sentence that the Court could impose would be up to one year incarceration in the County Jail, but no more, and that Petitioners would be placed on probation for a period of time to be determined by the Court (RT 75). As part of the plea bargain, it was stated that the People would not be pursuing prosecution of the other charges contained in the indictment (RT 76). The Court stated to petitioner that if either side chose to call him as a witness in that matter, that he must cooperate in a reasonable and truthful manner with either side in the case (RT 77).

On March 11, 1975, in the case of *People v. Ronald Silverton*, Case No. A 308 468 (2d Crim. 27380), the People called Petitioner herein, Wilkes, as a witness by and on behalf of the People, and he was sworn and examined (SRT 1630, lines 5-17). The prosecutor asked the petitioner, "Were you convicted of a felony in this Court in the month of February, 1975?" The petitioner responded "In this Court I pled guilty to a conspiracy, yes, misdemeanor."(SRT 1687, lines 19-22.) For the next four pages of transcript, the prosecutor harangues petitioner witness about the fact that conspiracy to commit a misdemeanor is a felony (SRT 1680-1691).

On cross-examination, which took place on March 13, 1975 (SRT 1826), petitioner witness stated he now understood that his plea of guilty to conspiracy to commit various misdemeanors was in fact a felony. Thereafter, the prosecutor stated:

"I would ask, your Honor, that the Court

counsel the witness on the law of perjury." (SRT 1890, lines 1-2.)

Thereafter, counsel for both parties approached the bench and the Court states:

> "And it goes without saying that as far as Mr. Wilkes is concerned, if on one occasion he says, yes, he admits the truth of the charge and if on another occasion, he says, 'I admit it but I'm really saying that I didn't do it,' that's up to him. And that would certainly have some effect on the Court's thinking processes as to what the defendant's state of mind is when I try to decide what would be the appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1891, lines 12-21.)

Counsel for defendant expressed some concern about the effect of the witness's testimony on his future sentence (SRT 1893, lines 10-18). The prosecutor stated that he felt that the witness was committing perjury (SRT 1893, line 28 - 1894, line 9). Immediately thereafter, the witness stated to the Court:

> "Would it be advisable for me to have my attorney here?"
>
> The Court stated:
> "I don't think so at this particular moment."

Witness (SRT 1895, lines 2-14), stated from the witness stand in response to the question as to whether he felt his taking the witness stand, as requested by the District Attorney, "will affect your sentence?" "Yes." (SRT 1945, line 22.)

The District Attorney, on redirect, asked his witness:

> "Did you admit that to the truth of the charges

that you pled guilty to, conspiracy to violate the adoption laws in violation of 182(1) of the Penal Code, conspiracy to commit various crimes?

"A: Yes. I made that statement.

"Q: And you admitted the truth of them; did you not?"

"A: I'm making that statement. I did, yes.

"Q: Was that statement true or false?"

"THE WITNESS [WILKES]: I did not have the statutes in front of me. I didn't recall what those statutes might have said or what they implied. I took the advice of counsel and pled guilty. I told them I would cooperate with the District Attorney and tell them everything I know. And I've done so."

> "MR. MOSS [PROSECUTOR]: I move to strike the answer as being nonresponsive.
>
> "THE COURT: The motion is granted. The answer is stricken. The jury is admonished to disregard it in its entirety."

The above colloquy took place at SRT 2002, line 9 - 2003, line 15. Thereafter, the Court stated:

> "I find the question quite straightforward. I find the attempt to answer it evasive." (SRT 2003, lines 27-28.)

This questioning concerning that question covered an additional four pages of transcript (SRT 2005 - 2008) and the Court then stated about the witness, appellant:

> "I wouldn't necessarily hold him in contempt. I find no ambiguity in that question at all. If he's not going to answer it, he's not going to answer it. And the jury can draw whatever inference they

> choose to draw from it. And, of course, I will draw my own . . . . When people don't choose to tell the truth, I consider they are creating their own pressure." (SRT 2008, line 21 - 2009, line 3.)

This type of haranguing concerning this question then goes on for an additional eight more pages of transcript (SRT 2009, line 4 - 2016 A, line 1).

On April 29, 1975, petitioner appeared before the Trial Court with his attorney and stated that there was no legal cause why sentence should not be pronounced (RT 79-81). The Court suspended the imposition of sentence (RT 81), denied formal probation, placed petitioner on summary probation for a period of three years on the condition that he spend his first nine months in the County Jail. The Court stated that it considered the charge a felony. On motion of the People, the remaining Counts of the indictment with which petitioner was charged, *i.e.*, Counts VIII through X and XIV, were dismissed in the interests of justice (CT 50). Bail on appeal was set at $2,000, in the event petitioner filed an appeal (CT 52). The appeal was filed (CT 53) with the California Court of Appeal, Second Appellate District (2d Crim. No. 27380) raising the issues that petitioner herein was denied his rights under the Sixth and Fifth Amendments to the Federal Constitution, which issues are raised herein by questions "1" and "2," respectively.

After the briefs had been filed by both Appellant and Respondent in the instant matter, the Court of Appeal, Second Appellate District, but a different Division (Division Four), reversed the conviction of co-defendant Silverton (*People v. Silverton*, 2d Crim. 28271) on the grounds that the revocation of § 1310 by the California Legislature prior to the final determination of the case was

a remission within "a universal common law rule" as applied by the United States Supreme Court in *Bell v. Maryland, supra*. (Said pertinent parts of the *Silverton* opinion are printed herein as Appendix "H.") The California Supreme Court ordered that the Silverton opinion not be published but permitted the case to stand. (That order of the California Supreme Court is printed herein as Appendix "I.") This reversal was raised by petitioner herein during oral argument on his appeal in the California Court of Appeal, and that court granted each party permission to file a Supplemental Brief on the point of § 1310 not being applied to petitioner herein consistent with his constitutional rights. These points are raised by questions "3" and "4" herein, *supra*. (See opinion of Court of Appeal, wherein permission to raise point was granted, Appendix "A" *infra*, page 7.)

On November 18, 1977, the Court of Appeal, Second Appellate District, Division One, filed the Opinion affirming the judgment and sentence. Said Opinion is printed herein as Appendix A, *infra*.

Thereafter each of the points aforementioned, and which are embodied within the four questions here raised, was timely raised by Petition for Hearing in the Supreme Court of the State of California, the highest State Court, which petition was denied without opinion on February 16, 1978, (Said denial is printed herein as Appendix "B.")

Thereafter, on March 17, 1978 the petitioner herein filed with the Court of Appeal of the State of California, Second Appellate District, Division One — the court to whom this instant writ is addressed, a "Notice of Petition for a Writ of Certiorari to the Supreme Court of the United States." (A copy of this notice stamped by the said Appellate Court is printed herein as Appendix "J.") Said notice designated as grounds for the petition, the Federal

issues raised by the "Questions Presented" herein.

Thereafter on May 9, 1978, Federal District Court Judge, Francis C. Whelan, sentenced petitioner herein to 15 months of incarceration; in a federal prison as punishment for petitioner herein violating his federal probation by virtue of the State Court's conviction of which this instant Petition requests review. (See transcript of said Federal Court proceedings, printed infra as Appendix "K.") Said 15-month sentence was in addition to, and not to be concurrent with, the nine months of incarceration ordered by the State Court because of said conviction. (Exhibit K, page 26 thereof, lines 20-25.)

REASONS FOR GRANTING THE WRIT

1. IT IS IMPORTANT THAT THIS COURT EXTEND THE CONSTITUTIONAL PROTECTION OF THE FIFTH AND SIXTH AMENDMENTS OF THE FEDERAL CONSTITUTION TO THE NUMEROUS SITUATIONS WHERE A NON-DEFENDANT WITNESS IS INDUCED TO TESTIFY WITH THE IMPLICIT, IF NOT EXPRESSED, PROMISE OF LENIENCY IF HE HELPS TO IMPLICATE THE DEFENDANT ON TRIAL, COUPLED WITH THE THREAT IMPLICIT IN THE PENDING CRIMINAL PROCEEDINGS AGAINST HIM IF HE DOES NOT.

The Constitutional mandate of the Fifth Amendment is clear: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The privilege "transcends its origins" and is fulfilled only when the accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Miranda v. Arizona*, (1966) 384 U.S. 432; 86 S. Ct. 1602; 16 L. Ed.2d 694.

But to know the existence of this right, and when it may be applied requires one to be skilled in the law. Thus the right to counsel as embodied within the *Sixth Amendment to the Federal Constitution*, as applied to the States by the *Fourteenth Amendment* Due Process Clause, does make any proceedings void under the *Federal Constitution when the circumstances show a fundamental unfairness to the defendant. Betts v. Brady*, (1942) 316 U.S. 455; 62 S. Ct. 1252; 86 L. Ed. 1595. The Fifth and Sixth Amendment rights would be meaningless in the absence of a knowledge of these rights and an intelligent waiver thereof, and the very purpose of the duty thus enjoined upon the Court is to advise an accused and to preserve to him a right which the Constitution has conferred upon him.

In the instant case, the Court was in the situation where from the quoted record it was obvious that petitioner was being put into a position where the Trial Court was being adversely affected in its thought concerning the sentencing of defendant and though the ultimate sentence of nine months of incarceration was less than the year that the Court might have given, it was also greater than the straight probation without incarceration, which it might have given.

The Court's failure to assign an attorney to the petitioner to advise petitioner of his jeopardy was concurrent with the failure of the Trial Court to warn petitioner of the danger of his testimony with regard to the possible increase of petitioner's sentence of incarceration. Because, though the Trial Court was bound by the plea bargain not to sentence petitioner to more than one year, it could certainly by virtue of petitioner's testimony, sentence petitioner to anywhere up to one year; and, in fact, it did sentence petitioner to nine months incarceration, where said sentence could have been no incarceration.

Although the testimony of petitioner in the *Silverton* trial was collateral to his own proceedings, the two proceedings arose out of the same indictment, and further, both were held before the same trial court. It would follow, then, that since petitioner had not yet been sentenced on his plea, he would be placed in a position of jeopardy by being forced to either incriminate himself on the remaining charges or be in the position in which he found himself, viz: in a position of incredibility with the trial court; thereby influencing the trial court on the question of sentencing which was still remaining.

Had petitioner had the benefit of counsel during his testimony in the *Silverton* trial, he could have discussed with him the advisability and manner of responding to certain questions, and thus, would have lessened or eliminated the amount of disfavor in which he was placed with the trial court. The term "lessened" is used here since the record tends to infer that some amount of disfavor may have existed in that the trial court when assigning the matter for a probation report and setting the matter for a probation and sentence hearing ordered petitioner to cooperate in a reasonable and truthful manner with either side in the case should he be chosen to be called as a witness (RT 77). The Court may have considered that petitioner's refusal to answer certain questions on the ground that it would incriminate him to be unreasonable. This inference could be drawn from the fact that the Court did not, when it made such an order, advise petitioner of his right to have counsel present with him should he be called to testify by either side.

Not only was petitioner not advised of his right to counsel, but also pressure was applied upon him by the Court in ordering him to testify if he were called to do so by either side. The court was shown petitioner's concern over his possible jeopardy when petitioner questioned the

Court whether it would be advisable for him to have an attorney present, and the Court replied that it did not think so at that particular time (SRT 1895). That this request occurred immediately after the Court indicated that appellant was not telling the truth on the witness stand is significant. The record is replete with comments made by the Court to the effect that appellant's testimony at the time of the *Silverton* trial was affecting the court's determination of an applicable sentence at the subsequent sentencing hearing concerning petitioner. (See the above "Statement of the Case.") Had petitioner had counsel present, petitioner would have had the benefit of expert advice in this precarious position, and, counsel could also have made the Court aware of this position petitioner was placing himself in during his testimony in the *Silverton* trial, and yet, at no time did the Court advise petitioner of his right to have counsel present.

The Court committed further error in not advising petitioner of his constitutional guarantee not to incriminate himself. Not only did the Court passively effect petitioner's constitutional right, but actively inhibited his pursuance thereof by affirmatively ordering petitioner to testify in the event he was called as a witness, and doing so immediately after scheduling a probation and sentence hearing, thereby implying to appellant that it was a condition that the Court would consider in rendering its sentence at said hearing. For reasons hereinbefore stated, to wit, that appellant was still facing sentencing on the charge to which he had pled guilty, it is submitted that all stages of the proceedings with respect to the latter had not been completed, and therefore his constitutional guarantees against self-incrimination remained intact.

Justice and fair play would dictate that this Court extend the Fifth and Sixth Amendments of the Federal

Constitution to prevent a non-defendant witness from testifying under the duress caused by prospects of his own impending sentence.

2. THE PUNISHMENT OF PETITIONER FOR VIOLATING AN EX POST FACTO LAW; AND EVEN MORE SO, ONE THAT HAS BEEN REPEALED PRIOR TO THE FINAL DISPOSITION OF PETITIONER'S CASE, IS AN INJUSTICE AND OUTRAGE WHICH CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

As afore-noted, Petitioner was sentenced to nine months incarceration by the State Court; and now faces an additional fifteen months incarceration in a Federal prison, as a sole result of this conviction. (Appendix "K" printed herein.) The disinterest of the Justices of the United States Supreme Court in the effect of injustice on one litigant has been well publicized.[3] Yet the clearly erroneous decision if left to stand deprives petitioner of a large chunk of his liberty in flagrant defiance of the Constitution. There is precedent for the United States Supreme Court taking notice of, and correcting, an obvious injustice to an individual litigant. *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543.

It is an obvious injustice to punish petitioner for violating *Health & Safety Code* Section 1310 from July 1, 1973 to December 31, 1973, though it was not effective until January 1, 1974. The Opinion of the Court of Appeal in this instant case properly stated on page 8 (Appendix

---

[3]Chief Justice Vinson stated in this connection:

"What the Court is interested in is the actual, practical effect of the disputed decision — its consequence for other litigants and in other situations." Speech before the American Bar Association at St. Louis. September 7, 1949, 69 S. Ct.

"A" printed *infra*) thereof that:

> "[T]he prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code (maintaining a home finding agency [placing children for adoption] without a license) was commenced before the effective date of that section on January 1, 1974."

The Appellate Court's afore-quoted statement that former *Health & Safety Code* Section 1310 was not in effect during the period that the indictment states that defendant violated that statute is, as a matter of fact, correct.

The indictment charges petitioner with a violation of Section 1310, *Health & Safety Code of California*, a misdemeanor, committed during the period July 1, 1973, and ending on or about the 31st day of December, 1973 (SCT 377).

The co-defendant first raised the issue that Section 1310 of the *Health & Safety Code* was not in effect during the period July 1, 1973, to December 31, 1973, by demurrer (SCT 458, 498, at page 488), which demurrer was joined in by petitioner Wilkes (CT 38). This demurrer was denied (SCT 522, CT 38). The co-defendant, Silverton, then petitioned the Appellate Court (2d Civil 45016) for a Writ of Prohibition to prevent the prosecution on the non-existent statute. This petition was denied without opinion; and then co-defendant, Silverton, petitioned for hearing to the California Supreme Court; which petition was denied without opinion.

Former *Health & Safety Code* Section 1310 did not take effect until January 1, 1974; the same date that its repeal became effective under Statute Chapter 1202, enacted in the Regular 1973 Session of the California

Legislature. (Page 8 of Appellate Court opinion printed *infra* as Appendix "A.")

The making of petitioner Wilkes' conduct prior to January 1, 1974, criminal by virtue of passing a law on January 1, 1974, making it criminal is an ex post facto law; that is, it is a retroactive criminal statute applying to crimes occurring before its enactment and substantially injuring the accused by punishing an act, innocent when done, or increasing the punishment, or taking away a defense, and as such, is prohibited by the *Federal Constitution* (Article I, Sections 9, 10).

Defendant had a right to know in advance of his acts [which took place July 1, 1973 - December 31, 1973, according to the indictment (SCT 377)] whether his acts would subject him to criminal penalties.

Even assuming that Section 1310 of the *Health & Safety Code* would have been in effect at the time that the indictment charged petitioner with its violation, viz: July 1, 1973 to December 31, 1973, then its repeal on January 1, 1974, without a Savings Clause demonstrated a legislative intent to follow the long established common law and bar all prosecutions under said section, not reduced to final judgment at the time of the appeal.

The Opinion of the California Supreme Court in *People v. Rossi* (1976) 18 Cal.3d 295, 34 Cal. Rptr. 64, 555 P.2d 1313, explored the issue of whether or not *California Government Code* Section 9608 abrogated the common law rule requiring a dismissal of criminal proceedings not yet final and based on an abolished statute:

"Section 9608, we explained in *Estrada*,[4] was

---

[4]Refers to *In re Estrada* (1965) 63 C.2d 740; 48 Cal.Rptr. 172; 408 P.2d 948.

enacted simply to authorize prosecutions under the former statute in order to avoid the technically absurd result by which a defendant could be prosecuted under no law, simply because the Legislature had decided to *increase* the punishment for his crime. [Citation.] We concluded, however, that the provision was not intended to abrogate the well-established common law rule which, in the absence of clear legislative intent to the contrary, accorded a criminal defendant the benefit of a mitigation of punishment adopted before his criminal conviction became final." (19 Cal.3d 299.)

As the United States Supreme Court has observed, it is "a universal common law rule that when the legislature repeals a criminal statute . . . this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not reached final disposition in the highest court authorized to review it." *(Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S. Ct. 1814).

This universal common law rule has withstood the test of time. [See the opinion of Chief Justice Marshall in *United States v. Schooner Peggy* (1801) 5 U.S. (1 Cranch.) 103, 110, 2 L. Ed. 49, 51.]

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One.

Respectfully submitted,

DAVID SILVERTON
Attorney at Law
Counsel for Petitioner

May 13, 1978

Supreme Court, U. S.
FILED
JUN 1 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977
No. 77-1629

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DAVID SILVERTON
Attorney at Law
3600 Wilshire Boulevard, Suite 220
Los Angeles, California 90010
Telephone: (213) 381-7511
Attorney for Petitioner,
Wayman O. Wilkes.

Westside Law Publishers Santa Monica, California (213) 451-1714

APPENDIX

A	Opinion of the Court of Appeal of the State of California, Second Appellate District, Division One (2, 11, 17, 18)	2
B	Order Denying Hearing by the California Supreme Court (People v. Wilkes) (2, 11)	16
C	California Health & Safety Code § 1310 (former) (4)	17
D	Repeal of California Health & Safety Code § 1310 (former) (4)	18
E	Amendment Six of the United States Constitution (5)	19
F	Amendment Five of the United States Constitution (5)	20
G	Article I, Sections 9 and 10, United States Constitution (5)	21
H	Excerpts from Court of Appeal Opinion in People v. Silverton, 2d Crim. No. 28271 (11)	22
I	Order Denying Hearing by the Supreme Court of the State of California after Judgment by the Court of Appeal (People v. Silverton)	24
J	Notice of Petition for Writ of Certiorari to the United States Supreme Court (11)	25
K	Transcript of Federal Court proceedings on May 9, 1978, United States District Court, Central District of California, Judge Francis J. Whelan, presiding (12, 16)	30

In the Supreme Court of the United States

October Term, 1977
No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Contained herein are reproductions of documents comprising the Appendices to the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One, in the within action.

NOT FOR PUBLICATION IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WAYMAN O. WILKES, Defendant and Appellant.	2 Crim. No. 27380 (Super. Ct. No. A 308468)

COURT OF APPEAL-SECOND DIST.
FILED
NOV 18 1977
CLAY ROBBINS, JR. Clerk
Deputy Clerk

Appeal from a judgment of the Superior Court of Los Angeles County. Thomas T. Johnson, Judge. Affirmed.

Rosen and Chalfin, and Frank P. Rosen, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Lawrence P. Scherb II and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX A

In an indictment, defendant Wilkes and others (including Ronald Silverton) were accused in count 1 of conspiracy to commit several felonies and misdemeanors (including attempt to sell a person or persons in violation of section 181 of the Penal Code, and soliciting children for adoption in violation of section 224p of the Civil Code.) In other counts (8, 9, 10, 14) defendant Wilkes was accused of misdemeanors (placing children for adoption without a valid license therefor). He admitted allegations of the indictment that he had been convicted of eleven felonies.

After denial of various motions (to set aside indictment, to suppress evidence, and for separate trials), Wilkes, who was represented by counsel (other than present counsel), withdrew his plea of not guilty and pleaded guilty to conspiracy to commit the misdemeanors alleged in count 1. The allegations that he conspired to commit the felonies were deleted from count 1. Probation was granted; and the other counts (8, 9, 10, 14) were dismissed as to him. After his plea of guilty and prior to sentencing, he testified at the trial of a codefendant Silverton. That trial was before the same judge who, at a later time, sentenced Wilkes. His

motion for issuance of a certificate of probable cause was denied.

Upon Wilkes' appeal from the judgment (order granting probation) entered on his plea of guilty, he contends that at the time he testified at the trial of codefendant Silverton, the court erred in not advising him of his right to counsel, or of his privilege against self-incrimination.

The People contend that the appeal should be dismissed because defendant did not obtain a certificate of probable cause pursuant to section 1237.5 of the Penal Code (citing People v. Meals, 49 Cal.App.3d 702, 708 [122 Cal.Rptr. 585].)

In People v. Kaanehe, 19 Cal.3d 1, 7-9 [_____ Cal.Rptr. _____, _____ P.2d _____], there were statements as to issues that properly may be raised on appeal where there has not been compliance with said section 1237.5. It was said therein (p. 8) that search and seizure issues may be raised on such appeal as an exception to section 1237.5, and that the section does not apply "where a defendant does not challenge the original validity of the plea but asserts that errors were committed in proceedings subsequent to the plea for

the purpose of determining the penalty to be imposed." It was also said therein (p. 9): "Other than search and seizure issues which are specifically made reviewable by section 1538.5, subdivision (m), all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings resulting in the plea."

Where a plea of guilty is entered as a result of plea bargain, and the judgment entered is contrary to the promise giving rise to the plea or where the state has failed to perform its part of the bargain, the trial court may allow withdrawal of the plea. (People v. Barteau, 10 Cal.App.3d 483, 486 [89 Cal.Rptr. 139]; see People v. Delles, 69 Cal.2d 906, 910-911 [73 Cal.Rptr. 389, 447 P.2d 629].) Whether the trial court allows withdrawal of a plea of guilty is directed to the trial court's discretion. (People v. Barteau, supra, p. 486.)

In the present case the defendant's plea of guilty was entered pursuant to plea bargain; however, he did not make a motion in the trial court to withdraw the plea. His brief on appeal does not claim any violation of the plea bargain. He has not presented an argument as to withdrawal of the plea. As above stated, his contention

on appeal is that the judge in the Silverton trial, wherein defendant was a witness (called by People), erred in not advising defendant, prior to his testifying therein, of his right to counsel, or of his privilege against self-incrimination.

Appellant argues that although "the Silverton trial was collateral to his own proceedings," the two proceedings arose out of the same indictment; "both were held before the same trial court"; and because defendant (at the time of testifying at Silverton trial) had not been sentenced on his plea, he "would be placed in a position of jeopardy by being either forced to incriminate himself on the remaining charges [counts 8, 9, 10, 14] or be in a position . . . of incredibility with the trial court, thereby influencing the trial court on the question of sentencing which was still remaining." He also asserts that while he was testifying at the Silverton trial, the judge made comments to the effect that defendant's testimony would affect the judge's subsequent determination of sentence to be imposed upon defendant.

The record shows that the plea bargain (made when defendant was represented by counsel), was, in substance, that defendant would plead guilty to count 1

pursuant to agreement that the allegations of conspiracy to commit the felonies would be deleted and the allegation of conspiring to commit the misdemeanors would remain; he would be placed on probation for a period of time to be determined by the trial court; as a condition of probation, he might be sentenced to county jail for a period of up to one year; if he violated probation, he could be sentenced to prison for the term prescribed by law on the offense to which he pleaded guilty; entry of the plea could possibly result in revocation of his parole in a federal case wherein he had been sentenced previously; and the People would dismiss the other charges (counts 8, 9, 10, 14) pending against him in the instant case.

After defendant pleaded guilty, the court ordered him to cooperate if called as a witness in the Silverton trial; and he said that he would cooperate. He testified at the Silverton trial on February 18, 1975.

About two months thereafter (April 29, 1975) he was sentenced on count 1 herein -- he was granted probation for three years on certain conditions, including a condition that he spend the first nine months in county jail; and, upon motion by the People, the remaining counts (8, 9, 10, 14) were dismissed.

Appellant does not assert that the sentence imposed was contrary to the plea bargain. His assertion to the effect that his testimony at the Silverton trial was prejudicial to him with respect to the remaining counts (8, 9, 10, 14), because those counts had not been dismissed before he testified, is not sustainable. Those counts were dismissed pursuant to the plea bargain.

Appellant's contention to the effect that the court erred in not advising him of his rights, when he testified at the Silverton trial, is not sustainable.

During oral argument, appellant asserted that, by reason of the opinion in People v. Silverton, 71 Cal. App.3d 790 [in the Advance Sheets], a reversal of the conviction of appellant herein [Wilkes] is required.

Also at the oral argument, this court granted respondent's (prosecution's) request for permission to file a Supplemental Brief in order to discuss the Silverton case referred to by appellant. Appellant was granted permission to file a Supplemental Brief in reply to the respondent's Supplemental Brief.

An issue raised in the Silverton case (by appellant Silverton) was to the effect that section 1310 of the Health and Safety Code (under which Silverton was charged

in count IX) "having been repealed," the indictment of Silverton for violating that section should be quashed. (Appellant Wilkes, in the present appeal, was a co-defendant of Silverton in that indictment.)

Since the time of oral argument (and after respondent had filed the Supplemental Brief), the Supreme Court ordered that the opinion in the Silverton case not be published.

The prosecution of appellant Wilkes for violation of former section 1310 of the Health and Safety Code (maintaining homefinding agency [placing children for adoption] without license) was commenced before the effective date of that section on January 1, 1974. That section was reenacted substantially in section 1508 of the Health and Safety Code which became effective on the same date the repeal of former section 1310 became effective (January 1, 1974).

In the course of consolidating statutes by enacting the new California Community Care Facilities Act (which includes sections 1500 et seq. of Health and Safety Code), several sections of the Health and Safety Code were repealed, including former section 1310 and former section 1250 (which defined "Facility" and "Home finding agencies").

In appellant's Supplemental Brief he states that when a criminal statute is repealed before conviction under that statute becomes final, prosecution under such statute may not continue (citing People v. Estrada, 63 Cal. 2d 740). He also states that a convicted defendant may not be punished for activity which has been legalized, after rendition of judgment, and before the judgment becomes final (citing People v. Rossi, 18 Cal.3d 295).

Appellant Wilkes states further in his Supplemental Brief that the repeal of sections 1310 et seq. of the Health and Safety Code is a bar to the indictment and the plea of guilty (by Wilkes) to count 1 of the indictment. He also states that the enactment of new section 1508 (which enacted substantially provisions of former section 1310) did not "save" the provisions of former section 1310 -- under provisions of section 9608 of the Government Code (which is to effect that termination of law creating a criminal offense does not constitute a bar to indictment for act already committed, unless intention to bar is expressly declared).

Appellant Wilkes also states that with the repeal of section 1310, sections 1500 et seq. and section 1253 of the Health and Safety Code were enacted, but only some of the sections of the repealed statutes were incorporated in

the new sections; that no provision relating to "Home Finding Agency" was incorporated in the new sections; that the Legislature intended that the specific activity outlined in former section 1310 be legalized; and that the Legislature made no provision for penalty for unlicensed "Home Finding."

Respondent's Supplemental Brief correctly states that in the course of codifying the new California Community Care Facilities Act, the provisions of former section 1310 of the Health and Safety Code were transferred to the new act along with a duplication of the punishment provisions of former section 1350.

Respondent also correctly states that as part of the consolidation of statutes into the new act, the home-finding provisions of former section 1310 were simultaneously repealed and then reenacted and transferred from Division 2, chapter 2, to Division 2, chapter 3, of the Health and Safety Code -- that the legislative bill which repealed section 1310, and the bill which enacted the California Community Care Facilities Act bear consecutive chapter numbers (i.e., Nos. 1202 and 1203, respectively), and both statutes became effective on January 1, 1974.

Former section 1310, under which appellant was

prosecuted, provided in part: "No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter . . . ."

The word "facility," as used in that section, was defined in former section 1250(a) as " . . . any hospital . . . homefinding agencies . . . ." The words "homefinding agencies" were defined in former section 1250(d) as " . . . persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption." (Section 1250, just referred to, was repealed by the same legislation that repealed section 1310.)

The new section 1508, which is in the Community Care Facilities Act, provides in part: "No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter."

The words "community care facility," as used in new section 1508, are defined in new section 1502 as

including any facility, place or building which is maintained and operated to provide homefinding agencies for children, adults or children and adults.

New section 1502 defines "homefinding agency" as "any individual or organization engaged in finding homes or other places of placement of persons of any age for temporary or permanent care or adoption." (Stats. 1973, ch. 1203, § 4, pp. 2582-2583.)

The saving clause of Government Code section 9608 (hereinabove referred to) provides: "The termination or suspension (by whatever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law."

Former section 1350 (which was repealed by same legislation that repealed section 1310) provided that punishment for violation of former section 1310 was a fine not exceeding $500 or by imprisonment in county jail not to exceed 180 days or by both such fine and imprisonment. New section 1540 (enacted by same legislation that enacted

the comprehensive new act) provided for same punishment for violation of new section 1508 as that provided in former section 1350.

It thus appears from comparison of former sections and new sections, above referred to, that the provisions of former section 1310 were reenacted substantially in new section 1508. The repealing statutes and the enacting statutes, as to the same general subject matter, became effective on the same date. The Legislature has not indicated an intent to decriminalize unlicensed homefinding activities or to lessen punishment therefor.

In In re Dapper, 71 Cal.2d 184 [77 Cal.Rptr. 897, 454 P.2d 905], the petitioner for a writ of habeas corpus made a contention similar to the contention of appellant in the present case. In ruling against the petitioner therein, the court said (p. 189): "'When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification

of statutes, because, obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.'"

In the present case, before such repeal and enactment, appellant herein had been convicted (by pleading guilty) of conspiring to commit misdemeanors, including violation of former section 1310.

Appellant's contention that the repeal of sections 1310 et seq. of the Health and Safety Code is a bar to the indictment and plea of guilty is not sustainable.

The judgment (order granting probation) is affirmed

WOOD, P.J.

We concur:

THOMPSON, J.

HANSON, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 16 1978

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 27380

People

vs.

Wilkes

Respectfully,

G. E. BISHEL
Clerk

50487-877 4-77 3M OSP

APPENDIX B

STATUTES OF CALIFORNIA

Article 4. Application of Chapter

1310. No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

APPENDIX C

STATUTES OF CALIFORNIA

CHAPTER 1202

An act to add Chapter 2 (commencing with Section 1250) to Division 2 of, and to repeal Chapter 2 (commencing with Section 1250) of Division 2 of, the Health and Safety Code, to amend Sections 16300 and 16312 of the Welfare and Institutions Code, and to amend Section 19 of Chapter 1148 of the Statutes of 1972, relating to health.

[Approved by Governor October 2, 1973. Filed with Secretary of State October 2, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, as added by Chapter 1148 of the Statutes of 1972, is repealed.

SECTION 2. Chapter 2 (commencing with Section 1250) is added to Division 2 of the Health and Safety Code, to read:

APPENDIX D

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX E

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

§ 9 [cl 3] No Bill of Attainder or ex post facto Law shall be passed.

§ 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX G

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,	) 2 Crim. No. 28211
	) (Super Ct. No.
Plaintiff and	) A308468)
Respondent,	)
v.	)Court of Appeal
	)Second Dist.
RONALD R. SILVERTON,	) FILED
	) Jul 15 1977
Defendant and	) Clay Robbins, Jr.
Appellant.	) Clerk
----------	)
In re	) Deputy Clerk
RONALD R. SILVERTON	) 2 Crim. No. 30496
	) (Super. Ct. No.
on Habeas Corpus.	) A308468)
	)

APPEAL from a judgment of the Superior Court of Los Angeles County; petition for writ of habeas corpus. Thomas T. Johnson, Judge. Judgment affirmed in part; reversed in part; writ denied.

Ronald R. Silverton, in pro. per., for Defendant and Appellant.

APPENDIX H

In his reply brief, defendant asserts that Health & Saf. Code § 1310, having been repealed, his indictment for violating Health & Saf. Code § 1310 must be quashed. Defendant relies upon In re Estrada, 63 Cal. 2d 740 (1965) and People v. Rossi, 18 Cal. 3d 295
(Page 11.)
(1976). In Estrada, supra, 63 Cal. 2d at pp. 746-747, it is said that: "It is the rule at common law and in this state that when the old law in effect when the act is committed is repealed, and there is no saving clause, all prosecutions not reduced to final judgment are barred." And, in Rossi, supra, 18 Cal. 3d at p. 300, it is observed that: "As the United States Supreme Court has observed, it is 'the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.' (Bell v. Maryland (1964) 378 U.S. 226, 230 [12 L. Ed. 2d 822, 826, 84 S. Ct. 1814].) In the instant case, this 'universal common-law rule' mandates the reversal of defendant's conviction."

We agree with defendant on this point and, accordingly, we must reverse his conviction of count IX.

In our case, since count I (conspiracy)
(Page 12.)
mentioned the acts barred by Health & Saf. Code § 1310 his conviction of count I must, also, be reversed.

ORDER DUE
September 13, 1977

ORDER DENYING HEARING
AFTER JUDGEMENT BY THE COURT OF APPEAL

2nd District, Division 4, Crim. No. 28211
Crim. No. 30496

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

SILVERTON

IN RE SILVERTON ON HABEAS CORPUS

SUPREME COURT
FILED
SEP 8 1977
G. E. BISHEL, Clerk

Petitions for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled cause which was filed July 15, 1977 and appears in 71 Cal. App. 3d 790. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

BIRD
Chief Justice

APPENDIX I

DAVID SILVERTON, ESQ.
3600 Wilshire Boulevard
Suite 220
Los Angeles, CA 90010
213/381-7511

Attorney for Petitioner (appellant/defendant)

2d CRIM. 27380

MAR 17 1978
Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Respondent, vs. WAYMAN O. WILKES, Defendant, Appellant.	NO. 2d CRIM. 27380 (Super.Ct. No. A 308468)

NOTICE OF PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

I

NOTICE IS HEREBY GIVEN that WAYMAN O. WILKES, the defendant/appellant above named, hereby petitions to the Supreme Court of the United States for a writ of certiorari to review the final order of the Court of Appeal of the State of California, Second Appellate District, Division One, filed on November 18, 1977, affirming the judgment of conviction and sentence of the Superior Court

APPENDIX J

of the State of California in and for the County of Los Angeles.

This appeal is taken pursuant to 28 U.S.C. Section 1257(3).

Appellant was convicted of the crime of conspiracy to commit various misdemeanors as charged in a modified Count One. Proceedings were suspended and appellant was granted probation for a period of three years on condition that he spend the first nine months in the County Jail, and is presently enlarged on a bail.

II

The Clerk, upon the request of the United States Supreme Court, will please prepare a transcript of the record in this cause to transmit to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record in the California Court of Appeal, Second Appellate District, Division One, including this "Notice of Petition for Writ of Certiorari," and the opinion and judgment of said Court.

III

Folbwing are questions which are presented by this petition for writ of certiorari:

(1) Whether petitioner's (appellant/defendant) rights under the Fifth and Sixth Amendments to the United States Constitution as applied to the states by the Fourteenth Amendment to the United States Constitution, were infringed upon.

(2) Whether the conviction of petitioner (appellant/defendant) was the result of an application of a retrospective criminal statute, viz.: an Ex Post Facto law, as prohibited by the Federal Constitution in Article I, Sections 9 and 10.

/S/ Original Signed

DAVID SILVERTON
Attorney for Petitioner
(Appellant/Defendant)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JEWELL HORRID, depose and say that I am over the age of 18 years and not a party to the within action; my business address is 3600 Wilshire Boulevard, Suite 220, Los Angeles, California 90010.

That on the 17th day of March, 1978, all parties required to be served have been served. On said date I served a copy of the foregoing notice of petition for a writ of certiorari to the Supreme Court of the United States on the STATE OF CALIFORNIA, appellee, by delivering the same to the receiptionist at the Office of The California Attorney General, Counsel of Record for said STATE OF CALIFORNIA, located at 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010.

Jewell Horrid
JEWELL HORRID

Subscribed and sworn to before me this 17th day of March, 1978.

Donnalee H. Smith
Notary Public in and for said County and State

OFFICIAL SEAL
DONNALEE H. SMITH
NOTARY PUBLIC CALIF.
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 29, 1980

A copy of the within "Notice of Petition for Writ of Certiorari to the Supreme Court of the United States" has been received by the undersigned, as authorized by the STATE OF CALIFORNIA Attorney General.

H. C. Horrid

OFFICE OF THE ATTORNEY GENERAL
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, CA 90010

DATED: MARCH 17, 1978

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE FRANCIS C. WHELAN, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 4772-Criminal
WAYMAN OTIS WILKES, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, May 9, 1978

BARBARA BROSNAN, CSR
Official Reporter
412 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: 680-1089

APPENDIX K

APPEARANCES:

For the Plaintiff:

Andrea Sheridan Ordin
United States Attorney

JAMES BRENDAN O'NEILL
Assistant United States Attorney
312 North Spring Street
Los Angeles, California 90012

For the Defendant:

FRANK P. ROSEN
1900 Avenue of the Stars
Los Angeles, California 90067

I N D E X

	PAGE
Further probation revocation hearing	4
Court revokes probation	28
Sentence of the Court	28

LOS ANGELES, CALIFORNIA, TUESDAY, MAY 9, 1978, 1:30 P.M.

--oOo--

THE CLERK: No. 19 on the calendar, 4772-Criminal, United States of America versus Wayman Otis Wilkes.

MR. O'NEILL: Good afternoon, your Honor. James Brendan O'Neill on behalf of the United States.

MR. ROSEN: Yes, the defendant is present, your Honor. Frank P. Rosen on behalf of the defendant.

I am sorry to represent to the Court once again that this matter, the state matter has not yet reached its final disposition, your Honor.

THE COURT: Wait just a minute. Why hasn't it? It says in my information that the Supreme Court on February 17th --

MR. ROSEN: It was February 16th, your Honor. They denied a hearing. However, through counsel other than myself Mr. Wilkes has filed or, rather, applied for writ of certiorari to the United States Supreme Court.

THE COURT: On what ground?

MR. ROSEN: Constitutional grounds, Fourth, Fifth and --

THE COURT: I understand, but on what ground?

MR. ROSEN: One ground is that the statute of which he was convicted was an ex post facto law.

The other grounds are -- I don't know if your Honor is familiar with the facts of the State Court trial below. That was, that Mr. Wilkes had entered into a plea bargaining with the district attorney's office in that matter and entered a plea of guilty to Count One. At that time, when he entered his plea, the Court indicated to Mr. Wilkes, among other things, that he was to cooperate fully with the district attorney's office if they were to require or request he be called as a witness against the co-defendant in that matter, Mr. Silverton.

At the time, approximately three weeks later when Mr. Wilkes was called to and did testify, it was our contention at the State Appellate level, and it remains the contention of the defendant at the U.S. Supreme Court level, that he should have been advised of his constitutional rights not to incriminate himself and of his right to counsel before he took the stand and testified. That seems to be an issue.

THE COURT: Are there cases that hold that he had to be?

MR. ROSEN: It seems to be a new issue, your Honor. I don't know of any cases. No, that is why we are applying for certiorari.

THE COURT: Wait just a minute. He had already pleaded?

MR. ROSEN: Yes, but he hadn't been sentenced.

THE COURT: All right. So what of it? What has that got to do with the effectiveness of his plea?

MR. ROSEN: For various reasons, and I am trying to refresh my recollection now from the briefs that I filed quite some time ago.

As I raised the issue in the briefs before the Appellate Court I contended that, number one, the matter not having been finalized -- that is, he not having been sentenced and there was a lid placed on the matter, I believe, of one year by the Superior Court in the plea bargaining -- it was my contention that he could get nothing or that he could get the maximum of the lid within the plea bargaining, and that one-year period still placed him in jeopardy. There are some other facts involved.

The Court accused him of lying when he was taking the stand, inferred that he would take it into consideration when he was sentencing him and what have you.

The other aspect of that particular constitutional issue was that there were, I believe, and my recollection may be off without referring to the file, there were 17 counts filed against Mr. Wilkes. None yet had been dismissed. Therefore, he was in jeopardy of the other 17 counts.

THE COURT: That would be a defense to those other 17 counts but not as to the one to which he pleaded guilty.

MR. ROSEN: I can't disagree with your Honor. The Supreme Court of the State of California has agreed. But what we contend is it is a constitutional issue that has not yet been decided and, of course, your Honor knows how many cases the Supreme Court will accept. It is a minute amount. We will know within, I'd say, 90 days to 120 days whether or not they will accept the application for certiorari. I don't know at this time. All I can tell the Court are the facts.

As I say, I do not represent Mr. Wilkes in his application for the writ of certiorari before the Supreme Court. I do know of my own personal knowledge that a request for a transcript and a notice of the application has been filed with the Supreme Court of the State of California.

THE COURT: Has been filed with it?

MR. ROSEN: Yes.

THE COURT: All right.

MR. ROSEN: I was informed by other counsel that either today or tomorrow the application will be filed to the Supreme Court, with the clerk of the Supreme Court.

THE COURT: The application for leave to file?

MR. ROSEN: Yes.

MR. O'NEILL: Your Honor, at issue here is the validity of the defendant's plea in the State Court to the state crime while he was on federal probation.

It appears that the matters defense counsel is raising in his petition for writ of certiorari are matters affecting the defendant's sentencing in the State Court. That sentencing occurred after the plea was knowingly and voluntarily entered into. It is the plea to that crime in the State Court that is the subject of the petition for revocation of probation.

At issue is the validity of that plea as it pertains to this defendant and possible revocation of his federal probation.

I have before me, your Honor, a trascript of that plea that occurred in Department 133 on February 18, 1975. I think some pertinent passages should be brought to the attention of the Court, if I may read from portions of the transcript.

THE COURT: Read them.

MR. O'NEILL: (Reading:)

"Wayman Otis Wilkes, to Count One of the indictment of a certain number which charges you with a violation of conspiracy to commit a

crime in violation of Section 182(1) of the Penal Code, how do you know plead; guilty or not guilty?

"The defendant: Guilty."

There is some more conversation and then the Court advises the defendant:

"If either side chooses to call you as a witness in the matter you must cooperate in a reasonable and truthful manner with either side in this case.

"The defendant: I will."

Then the deputy district attorney advises the defendant of some more rights.

"Two additional waivers, your Honor, please. Mr. Wilkes, you understand that while the Court is limited to one year in the County Jail initially as a condition of probation, if you violate that probation you could be sentenced up to the State Prison for the term proscribed by law, and that term proscribed by law in this case, the one you have pled guilty to, the conspiracy charge, would be from one to three years. Do you understand that?

"The defendant: Yes."

"I understand you are on federal parole.

"The defendant: Probation."

Then the deputy D.A. says:

"This matter has no bearing or effect one way or the other on your federal probation. They might choose to violate you. They might not, but that is a decision they make independently of what this Court does. Do you understand that?

"The defendant: Yes."

Then the Court concludes by instructing the defendant to check with his probation officer.

So I think that part of the transcript highlights that the defendant was aware that his plea in State Court had been entered and it would have a bearing on his federal probation, that any plea agreement made in connection with that particular case would not have effect on his federal probation and whether or not that federal probation was violated.

THE COURT: I don't think I heard counsel for the defendant contend about that.

MR. ROSEN: No, no, I don't contend at all. I am only concerned with this Court's attitude of not wishing to have a probation hearing, from my past experience, until the matter is finalized.

May I just respond briefly to what counsel said.

THE COURT: I think it is finalized for all practical purposes and for all legal purposes.

MR. ROSEN: Except that let's assume that certiorari is granted. The result would be that he could --

THE COURT: Supposing it is. Then you can come in and ask me to vacate that sentence, the sentence that I am now going to impose. If it is done within 120 days I have the power to vacate it for further sentencing.

MR. ROSEN: Of course, there is a practical matter. If the Court does sentence Mr. Wilkes to time, then the practicality, Mr. Wilkes went through this once before through an error in the Appellate Court by prior counsel or the clerk or something, and his appeal bond was --

THE COURT: I can't see any legal merit to his application for certiorari.

MR. ROSEN: Except, though, your Honor, if the Court does grant certiorari -- this, I wanted to respond to counsel -- it would not necessarily go to the issue of the sentencing. It would go to whether or not he could withdraw his plea.

Counsel read a portion of the transcript and I don't have it with me, but there is a portion in the trial transcript when he was testifying that he indicated

to the Court under oath that he did not understand or was he aware of the consequences of his plea at the time. This is one of the times when the Court indicated --

THE COURT: All right. That is a self-serving statement.

MR. ROSEN: I understand that. But it was our contention throughout the appellate level in the State Court that the plea should be set aside because of the violation, and I believe that if certiorari were granted that would be the result before the Supreme Court because there is a constitutional issue. As I say, it's never been decided.

THE COURT: What is it? After he enters a voluntary plea of guilty then what is the constitutional issue thereafter?

MR. ROSEN: Whether or not before sentencing and before additional counts which have not been dismissed have been dismissed, should he be allowed to testify against himself or testify at all concerning the facts out of which that matter arose without first being advised of his right not to and, second, being advised of his right to have counsel present if and when he does.

THE COURT: You have some authorities to that effect?

MR. ROSEN: If I did perhaps we would have been

successful before the Supreme Court. I have only analagous authorities.

THE COURT: I don't consider that that is any valid, legal cause at all. If you turn out to be right, why, then, you can make a motion.

Now, let's see. Arraign him right now.

THE CLERK: He has been arraigned, your Honor, but he hasn't admitted or denied.

Mr. Wilkes, on February 8, 1976, the probation officer filed a petition for an order to show cause why the probationary order of February 19, 1970 should not be revoked. That petition alleges that you have violated the terms and conditions of probation, to wit:

On February 18, 1975, in California Superior Court Case No. A308468 the probationer pleaded guilty to Section 182.1 P.C., conspiracy to commit 224(p) Civil Code, 22(h) Civil Code, in violation of Health Safety Code Section 1310, 1350, 1508 and 1540, and also Section 273(a) of the Penal Code. All crimes were deemed to be misdemeanors.

Mr. Wilkes, do you admit or deny that you have violated the terms and conditions of probation as alleged by the probation officer?

MR. ROSEN: Your Honor, at this time, before there is an admission or denial, I believe that the probation has terminated. I may be wrong, but I think that

it was a period that has since passed and I don't believe --

THE COURT: You say that it has what?

MR. ROSEN: I think that probation has terminated for which --

THE COURT: No, it hasn't. The period of probation was to commence after he finished his sentence of imprisonment.

MR. ROSEN: I believe that was more than four years ago, your Honor.

THE COURT: Why don't we talk about five instead of four or three.

MR. ROSEN: Your Honor, according to the order that I have it is four years and it commences on the 19th of February, 1970.

THE COURT: How could it? Wasn't he on bail pending his appeal?

MR. ROSEN: The appeal in the State Court?

THE COURT: He took an appeal.

MR. ROSEN: I don't know about the appeal in the Federal Court, your Honor.

THE COURT: Well, you should. I am just telling you that if it ended -- The period of probation did not start to run until at the very -- if there was no stay, then it didn't start to run until February 19th, 1974.

MR. ROSEN: It is our understanding that it started April the 19th, 1973, your Honor.

THE COURT: How did you get that idea?

MR. ROSEN: This is what the defendant advises me.

THE COURT: I don't care what he advises you.

MR. O'NEILL: Your Honor, may I be of some assistance.

THE COURT: Well, if you know what you are talking about, but otherwise, don't bother me.

MR. O'NEILL: Yes, your Honor. I have some facts from the files in the case and from the probation officer.

The probation officer has advised me that this defendant got out of prison on his federal conviction on July 21st, 1972.

THE COURT: Well, just a minute. All right. Have you ever heard that the sentence hasn't been completed until the parole time is over?

MR. O'NEILL: Yes, your Honor. That expired on April 21st, 1973, parole expired. My understanding is it was a five-year parole term and, therefore, that would end on April the 21st, 1978.

THE COURT: Are you talking knowingly or not, or are you taking it from the probation officer? How could

he serve a sentence for four years and be out?

MR. ROSEN: There was time off for good time, your Honor.

THE COURT: All right, time off for good time. How much?

MR. O'NEILL: Your Honor, I know that the probation presentence report indicates that he was in custody for 167 days before the time he was sentenced. I assume that that time was credited toward the four-year sentence which he received.

THE COURT: Why don't you find out. I don't recall that he was in custody.

MR. O'NEILL: The presentence report dated --

THE COURT: Let me see it.

MR. O'NEILL: -- dated February 19th, 1970 so indicates, your Honor. May I approach the clerk?

THE COURT: I can read as well as can you.

(Document handed to the Court.)

THE COURT: Furthermore, did you ever give -- listen, don't be taking your advice from a probation officer.

Did you give any consideration to the fact that the petition for revocation was filed in 1976? Did you?

MR. O'NEILL: Yes, your Honor.

THE COURT: Do you know what the rule is?

MR. O'NEILL: Yes, your Honor. If the violation occurs during the term of probation, even though he is brought into court after the probation has expired --

THE COURT: No, if the warrant was issued in 1976.

MR. ROSEN: If your Honor recalls at the last hearing, counsel could not be present. I was not available to call that to the attention of the Court when the Court continued it.

THE COURT: I am just telling you that the petition, even according to your theory, the petition was filed and the Court ordered the petition to go forward in 1976. May I see a copy of the petition and then I want this file found.

I will keep this case until I get the file. I want to find out when the man was here in court. According to this record, he should have been here in court on February 19th, 1976. Even according to your theory, that was well within the period of probation. All right. Call the other case.

I am going to ask. I want to see a copy of the complaint showing the date of the -- a copy of the indictment. Do you have one, Mr. O'Neill?

MR. O'NEILL: A copy of the indictment, your Honor?

THE COURT: Yes.

MR. O'NEILL: Yes, I have one.

THE COURT: Showing the date it was filed. You say he was released in February of 1972 from prison? He was released from prison when?

MR. ROSEN: I believe July, your Honor.

MR. O'NEILL: July 21st, 1972, your Honor. We have a document showing his mandatory release, Parole Form I-13.

THE COURT: February 23rd?

MR. ROSEN: July.

MR. O'NEILL: July 21st, 1972, your Honor.

THE COURT: 1972?

MR. O'NEILL: Yes.

THE COURT: All right. Well, the law is very clear, most clear, that the petition must issue during the period of probation in order to make it valid, and that he be in court during the period of probation. He has been coming in here to court for a long time. So we won't bother about it any further.

MR. ROSEN: My records indicate that the first appearance in court was July 12th, 1976. I believe there was an appearance from Mr. Wilkes prior to that by counsel, he being incarcerated in the state institution. He was incarcerated at the time of the first hearing, your

Honor, and did not appear except through counsel.

My records, and they may be erroneous because I wasn't representing him at that time, my records indicate that his first appearance was July 12th.

THE COURT: What was the date he was released?

MR. ROSEN: July 17, 1972.

THE COURT: All right. So he was in court on this charge within the five-year period. All right. Did he either admit or deny?

THE CLERK: Neither one. He never answered.

THE COURT: All right. Then it is deemed that he denied it. The matter will be set for trial unless you have a certified copy --

MR. ROSEN: Excuse me. We are prepared to admit at this time, your Honor.

THE COURT: Very well.

MR. ROSEN: The question hadn't been completed. I interrupted the clerk and I am sorry.

THE COURT: All right.

THE CLERK: Mr. Wilkes, do you now admit or deny that you have violated the terms and conditions of probation as alleged by the probation officer?

THE DEFENDANT: Yes.

MR. ROSEN: Do you admit?

THE DEFENDANT: Yes, I do. I admit.

THE COURT: By the way, that mandatory release too, that doesn't end parole.

MR. ROSEN: I understand.

THE COURT: In other words, parole means the end of the sentence.

Is there anything that you have to say, Mr. Wilkes, before sentence is pronounced?

MR. ROSEN: May I speak on behalf of the defendant first.

THE COURT: He has the right to do so first.

MR. ROSEN: I understand, your Honor. Do you have anything that you want to say to the Court?

THE DEFENDANT: Well, your Honor, I didn't believe at the time this act was committed that it was anything illegal about it. And all I did was recommend an ex-niece of mine to an attorney who was in the adoption practice and that's the extent of my involvement.

THE COURT: According to the probation report there were two women involved.

THE DEFENDANT: No, your Honor,there was only one. Her name was Cathy Brown.

THE COURT: What was her name?

THE DEFENDANT: Cathy Brown.

THE COURT: WAs there some woman living in your home at about that same time?

THE DEFENDANT: No, your Honor. No, there was not, your Honor.

THE COURT: Well, you don't have to answer these questions unless you are -- you don't have to answer any questions the answer to which might tend to incriminate you. So I advise you that you don't have to answer my question. Did you know a Rosemary Henry?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you introduce her -- you don't have to answer these questions.

MR. ROSEN: He is prepared to answer the questions about that issue of the state.

THE COURT: Did you refer Rosemary Henry to Mr. Silverton?

THE DEFENDANT: No, I did not, your Honor.

THE COURT: Do you know if she talked to Mr. Silverton?

THE DEFENDANT: I understand she did, your Honor.

THE COURT: Did you suggest to her that she talk to Silverton?

THE DEFENDANT: I beg your pardon, your Honor.

THE COURT: Did you suggest --

THE DEFENDANT: No, your Honor, I did not. I didn't know that she had talked to him. I did not even

know that she had talked to him.

THE COURT: Well, anything further that you wish to say?

THE DEFENDANT: Well, all I can say is, your Honor, I am sorry that this all came about and I had no intention of violating any laws. That would have been foolish, being on probation, to even think about violating the law. And I didn't think that an attorney would be doing anything illegal. I don't think it's been decided yet whether --

THE COURT: Did you use cards, calling cards that referred to you as a doctor?

THE DEFENDANT: I think Mr. Silverton handed out some cards. He wanted me to tell my doctor friends about his practice. That is the extent of it.

THE COURT: You never had any cards printed with your name on it and calling you a doctor?

THE DEFENDANT: Mr. Silverton, I think, had some identical cards to his printed, yes, with my name on it.

THE COURT: You knew he had them, didn't you?

THE DEFENDANT: Yes.

THE COURT: You knew that he was going to use them, didn't you?

THE DEFENDANT: I didn't sanction it.

THE COURT: What did you tell him about not using it?

THE DEFENDANT: I didn't discuss it with him. I did not discuss it with him, your Honor.

THE COURT: Do you have anything further to say?

THE DEFENDANT: That is all, your Honor.

THE COURT: Do you have anything to say in his behalf, Mr. Rosen?

MR. ROSEN: Yes, your Honor, a few points that I should like to call to the attention of the Court. I realize that they may be self-serving but they are circumstances that I think the Court should be aware of.

As your Honor is probably aware, I did not represent Mr. Wilkes in the matter below. There were --

THE COURT: You mean at the original one where he pleaded?

MR. ROSEN: At the trial level, yes, your Honor.

THE COURT: I mean where he pleaded guilty?

MR. ROSEN: That's correct. It is my understanding -- First of all, let me call to the Court's attention a matter that happened. When I was called into the case to handle the appeal I was the third attorney. The first attorney had filed a notice of appeal. This is just one example that I want to call to the attention of the

Court. He had filed a notice of appeal in Mr. Wilkes' name in pro per with the attorney's address on it in the upper left-hand corner. That attorney had moved his office subsequent to that notice being filed and had not left a forwarding address.

Mr. Wilkes was out on an appeal bond at that time. The transcripts not having reached Mr. Wilkes nor his attorney by the clerk, the necessary documents not having been filed, that matter was dismissed.

THE COURT: Of course, I know that because when I first saw you in this matter I was told.

MR. ROSEN: I wasn't sure the Court was aware of it.

THE COURT: I remember, but he did get the right to appeal.

MR. ROSEN: After serving eight and a half months. He served eight and a half months of his nine-months sentence that the Court had imposed.

What I am trying to bring out to the Court, the attorney below, when I read these transcripts, I was convinced that perhaps the matter wasn't handled properly. However, I did not believe that there were enough facts before me in the transcripts to allege one of the grounds as incompetence of counsel.

As your Honor has heard and is aware, the plea

was entered, according to Mr. Wilkes' testimony or statements before the Court, freely and voluntarily. Mr. Wilkes has told me that he didn't really understand what was going on at the time. I have found out from Mr. Wilkes and other people that the attorney advised him below that it was going to be a matter of three or four weeks in court. It would cost Mr. Wilkes in excess of an additional $10,000. He suggested to him at that time that he enter his plea because it would be much more reasonable for him and he didn't have the time to try the matter.

Mr. Wilkes, with this advice -- and by the way, the attorney was provided by the co-defendant, Mr. Silverton. I am only calling these facts to the Court's attention to mitigate these circumstances.

THE COURT: Well, if he was being provided by Mr. Silverton, what difference does it matter.

MR. ROSEN: He didn't pay for it. He recommended. Mr. Wilkes did not know who to go to.

THE COURT: Who was his attorney?

MR. ROSEN: Dobbs. What was his first name?

THE DEFENDANT: Steven.

MR. ROSEN: Steven Dobbs.

Of course, the plea was entered and the matter is all behind us now, but it is just one of many circumstances.

Mr. Wilkes was out on an appeal bond and still had to serve eight months and some days of his sentence.

Later, when it was finally dismissed -- rather, when the dismissal was reversed, then he got out.

I also want to call to the attention of the Court that he still had, I believe, if good time were taken into consideration, 17 days left on his sentence. How many?

THE DEFENDANT: Nine.

MR. ROSEN: Nine days. I believe it was 17. Mr. Wilkes says it was nine.

We appeared on the remittitur when the Supreme Court in the State Court denied the appeal and the Court in that matter suspended the sentence and terminated the probation. That was approximately two months ago.

I think in this particular matter, your Honor, Mr. Wilkes got involved with Mr. Silverton. Perhaps there were some things that he should have been aware of that he wasn't. But irrespective of that, I think that the sentence that he has served, some eight and a half months, and I don't believe, your Honor, that it would have been that sentence. I think it would have been probably straight probation in the State Court except that Mr. Wilkes did not handle himself properly when he testified on behalf of the People in the trial against Mr. Silverton.

The Court, there are many instances and many direct quotes by the Court that he didn't believe Mr. Wilkes and it could affect his sentencing. Mr. Wilkes asked him at that time, "Do you think I should get an attorney?" And he said, "No, you don't need an attorney."

I was quite appalled when I read that portion of the transcript, with all due respect to the trial court. I understood his position at the time but it seemed like Mr. --

THE COURT: I don't recall any Supreme Court of the United States ruling to the effect that when a witness gets on the stand he must be advised by the Court of his right to remain silent.

MR. ROSEN: I agree, your Honor, that there are no cases. I couldn't find any. But I think it is an issue that perhaps might be decided by the Supreme Court.

Basically, the rule is that if a defendant is still in jeopardy, and there have been -- I can't recall the cases now. It's been a while since I was involved in the cases.

THE COURT: He can still voluntarily testify.

MR. ROSEN: But in any event, I am only calling that to the attention of the Court now to show the series of circumstances.

I believe Mr. Wilkes has suffered quite

immensely as a result of this. It's cost him quite a large sum for attorney fees to now four different attorneys. He did spent eight and a half months in the County Jail and up until a month and a half ago he was still on probation to the State Court.

THE COURT: Any legal reason why sentence should not now be rendered?

MR. ROSEN: No, your Honor.

THE COURT: Any legal reason to show why judgment should not now be rendered?

MR. ROSEN: There is none, your Honor.

THE COURT: All right. The Court finds from the admission of the defendant that he has violated the terms of probation. The Court now revokes the probationary order imposed as to Counts Three and Four and the Court reduces the period of sentence of the defendant on Counts Three and Four from five years to 15 months.

It is ordered, adjudged and decreed that the defendant is committed to the custody of the United States Attorney General or his authorized representative on Counts Three and Four for a period of 15 months.

Sentences on Counts Three and Four are to run concurrently with and not consecutively to each other.

Does he want a few days?

MR. ROSEN: Yes. Could we have a stay on that,

your Honor.

THE COURT: How long?

MR. ROSEN: I would think that it would take approximately three weeks for him to get his affairs in order. Your Honor knows that he has been --

THE COURT: What business is he in?

MR. ROSEN: He is working for a medical clinic, for a medical group that have numerous clinics throughout the country. He is an administrator.

THE COURT: Why isn't two weeks enough?

MR. ROSEN: I think it would probably take more than three weeks, your Honor, to get his affairs in order. The medical group relies on Dr. Wilkes. He has to change the systems around and have somebody trained to replace him to know all of these matters that are involved. He has personal matters with his family that he has to take care of.

THE COURT: Just a minute. Will you read me counsel's last statement.

(Record read.)

THE COURT: Did you hear what I was hearing?

MR. ROSEN: I realize that, your Honor. That is a slip of the tongue. I know that he is not a doctor but I have --

THE COURT: I know, but he's been holding himself

out to be.

MR. ROSEN: Not to me, not to me, your Honor. I get telephone messages and the messages say "Mr. Wilkes." I have been through this --

THE COURT: I am not saying known to you as but known to others as.

MR. ROSEN: I don't believe that is true. I believe I picked this up from the transcripts, your Honor.

THE COURT: His sentence is stayed, the execution of sentence is stayed until 11:00 o'clock a.m. on Tuesday, May 23rd.

The defendant is ordered to surrender himself on or before that date and that time to the United States Marshal on the Main Street floor of this building. Very well.

- - -

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 4772-Criminal
WAYMAN OTIS WILKES, Defendant.	)	

C E R T I F I C A T E

I hereby certify that I am a duly appointed, qualified and acting official reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 30 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Tuesday, May 9, 1978, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of May, 1978.

Barbara Brosnan
Official Reporter

In the Supreme Court of the United States

October Term, 1977
No. 77-1629

Supreme Court, U. S.
FILED
SEP 6 1978
MICHAEL RODAK, JR., CLERK

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

EVELLE J. YOUNGER,
Attorney General of the State of California
JACK R. WINKLER, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
ROY C. PREMINGER,
Deputy Attorney General

800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2179

Attorneys for Respondent

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

Cases	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions, Statutes And Other Materials Involved in the Case	3
Statement of the Case	4
Argument	6
I. Petitioner's Claim Concerning Denial of His Right to Assistance of Counsel and Infringement of His Privilege Against Self-Incrimination Is Moot	6
II. Petitioner Was Properly Convicted of Conspiracy to Violate Former California Health and Safety Code Section 1310	13
Conclusion	22

APPENDIX

California Stats. 1972, ch. 1148, art. 8, § 20, p. 2243 23
California Stats. 1972, ch. 1593, Part 1, ch. 1 § 103, p. 3328 24
California Statutory Record, 1969-1972, Stats. 1972, p. 511 25
California Constitution, Art. IV, § 8 29
California Constitution, Art. XVIII, § 4 31
California Statutory Record, 1969-1973, Stats. 1973, p. 537 32
California Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3 36
California Stats. 1973, ch. 1202, § 1 37
Former California Health and Safety Code § 1310 38
California Health and Safety Code § 1250(a) and (d) 39
California Health and Safety Code § 1508 40
California Health and Safety Code § 1502 41
California Health and Safety Code § 1540 42
California Government Code § 9608 43

TABLE OF AUTHORITIES CITED

Cases **Page**

Boykin v. Alabama (1969) 395 U.S. 2388 22
Butts v. Wainwright (5th Cir. 1968) 402 F.2d 834 7
County of Los Angeles v. Lamb (1882) 61 Cal. 196 14-15
Ex Parte Baez (1900) 177 U.S. 378 8
Heaton v. Marin County Employees Retirement Board (1976) 63 Cal. App.3d 421 21
Hoffman v. United States (1951) 341 U.S. 479 11
In re Dapper (1969) 71 Cal.2d 184 20
People v. Kuhns (1976) 61 Cal. App.3d 735 20
People v. Rossi (1976) 18 Cal.3d 295 ..... 17, 18
People v. Silverton, 2d Crim. No. 28211 ..... 2, 21
People v. Stewart (1969) 1 Cal. App.3d 339 12
People v. Webb Bros. (1934) 139 Cal. App. 334 15
Powers v. Sissoev (1974) 39 Cal. App.3d 865 21
Wainwright v. Rewis (5th Cir. 1973) 486 F.2d 306 8

Constitutions

Cal. Const., art. IV, § 8, subd. (a) 3, 15
Cal. Const., art. IV, § 8(c) 16
Cal. Const., art. XVIII, § 4 16

Statutes

California Community Care Facilities Act (Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3) 18
Civ. Code § 224p 2, 4, 13
Civ. Code § 224q 2, 4, 13

Gov. Code § 9606 ..... 4, 17, 20
Health & Saf. Code § 1250 19
Health & Saf. Code § 1310 ..... 2, 3-4, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22
Health & Saf. Code § 1350 ..... 2, 4, 13, 19
Health & Saf. Code § 1502 ..... 4, 19
Health & Saf. Code § 1508 ..... 2, 4, 13, 16, 17, 18, 19, 21
Health & Saf. Code § 1540 ..... 2, 4, 13, 19
Pen. Code § 273 ..... 2, 4, 13
Stats. 1971, ch. 1217, § 3.5 15
Stats. 1971, ch. 1593, Part 1, ch. 1, § 103, p. 3238 ..... 13, 15
Stats. 1972, ch. 1148, § 3, subch. 2, art. 4, p. 2230 15
Stats. 1972, ch. 1148, art. 8, § 20, p. 2243 ..... 3, 15
Stats. 1973, ch. 1202, § 1 ..... 3, 16, 18, 19
Stats. 1973, ch. 1203, subch. 3 ..... 3, 18
Stats. 1973, ch. 1203, § 3 ..... 3, 18
Stats. 1973, ch. 1203, § 4 ..... 3, 16, 18
Statutory Record, 1969-1972, Stats. 1972, p. 511 ..... 3, 15
Statutory Record, 1969-1973, Stats. 1973, p. 537 ..... 3, 16

Books

2A Sutherland, *Statutory Construction*, (4th ed. 1973) § 47.13, pp. 92-93 20
77 A.L.R.2d 336 21

Opinions

56 Ops. Cal. Atty. Gen. 176-180 (1973) 15, 16

In the Supreme Court of the United States

October Term, 1977
No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

On November 18, 1977, a panel of three justices of the Court of Appeal of the State of California, Second Appellate District, Division One, rendered an opinion in Case 2d Crim. No. 27380 affirming petitioner's conviction in the Superior Court of the State of California for the County of Los Angeles, for the felony of violation of California Penal Code section 182, subdivision 1, conspiracy to commit the following misdemeanors: placing an

advertisement soliciting children for adoption, a violation of Civil Code section 224p; placing children for adoption without holding a license issued by the California Department of Health, a violation of Civil Code section 224q; operating a community health care facility and home-finding agency without having obtained a license from the California Department of Health, a violation of Health and Safety Code sections 1310, 1350, 1508, and 1540; and offering to pay money and paying money to a parent for the placement of their child for adoption, a violation of Penal Code section 273, subdivision a.[1] The opinion of the Court of Appeal was ordered unpublished. A copy of this opinion is included in Appendix A of the Appendix to Petition for Writ of Certiorari filed herein with this Honorable Court by petitioner. (*See also* CT 1-2, 49.)[2]

On February 16, 1978, the Supreme Court of the State of California denied petitioner's petition for a hearing without opinion. A copy of said denial is contained in Appendix B to petitioner's Appendix.

JURISDICTION

The ground for jurisdiction of this Honorable Court urged by petitioner appears in the petition, page 2.

---

[1]Unless otherwise noted, all references to statutes herein are to statutes of the State of California.

---

[2]The following abbreviations are used in the brief in reference to transcripts: CT — Clerk's Transcript; RT — Reporter's Transcript; SRT — Reporter's Transcript in *People v. Silverton,* Court of Appeal No. 2d Crim. 28211. Volumes 6, 7 and 8 of the Reporter's Transcript in *People v. Silverton* were made part of the record on appeal herein by order of the Court of Appeal filed January 17, 1977.

QUESTIONS PRESENTED

1. Was petitioner denied his constitutional rights to assistance of counsel and not to incriminate himself?

2. Was petitioner prosecuted under an ex post facto law or improperly punished under a law which had been repealed prior to the final disposition of the prosecution?

* * * *

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER MATERIALS INVOLVED IN THE CASE

Petitioner has set forth a portion of the constitutional provisions and statutes involved. (*See* Petn., pp. 5-6.) Respondent will herein cite the following additional pertinent constitutional provisions, statutes and other materials:

1. California Stats. 1972, ch. 1148, Art. 8, § 20, p. 2243.

2. California Stats. 1971, ch. 1593, part 1, ch. 1, § 103, p. 3238.

3. California Statutory Record, 1969-1972, Stats. 1972, p. 511.

4. California Constitution, Article IV, section 8.

5. California Constitution, Article XVIII, section 4.

6. California Statutory Record, 1969-1973, Stats. 1973, p. 537.

7. California Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3.

8. California Stats. 1973, ch. 1202, § 1.

9. Former California Health and Safety

Code section 1310.

10. Former California Health and Safety Code section 1250 (a) and (d).

11. California Health and Safety Code section 1508.

12. California Health and Safety Code section 1502.

13. California Health and Safety Code section 1540.

14. California Government Code section 9608.

Said pertinent constitutional provisions, statutes and other materials are set forth verbatim in Respondent's Appendix hereto.

STATEMENT OF THE CASE

Pursuant to a plea bargain petitioner pleaded guilty to count I of an indictment which charged him with the felony of conspiracy (Pen. Code § 182, subd. 1) to commit the following misdemeanors: placing an advertisement soliciting children for adoption (Civ. Code § 224p); placing children for adoption without a license issued by the California Department of Health (Civ. Code § 224q); operating a community health care facility and home-finding agency without having obtained a license from the California Department of Health (Health & Saf. Code §§ 1310, 1350, 1508, 1540); and offering to pay money and paying money to a parent for placement of their child for adoption (Pen. Code § 273, subd. a). As part of the plea bargain, it was agreed that the allegations in count I of the indictment charging appellant with conspiracy to commit various felonies would be deleted; that petitioner would be placed on probation for a period of time to be determined

by the trial court; that as a condition of probation petitioner could be sentenced to up to one year in county jail; that if petitioner violated his probation, he could be sent to state prison for the term prescribed by law for the crime to which he was pleading guilty; that his entering the guilty plea could result in his parole being revoked in a separate federal court case in which he had previously been sentenced; and that the prosecution would dismiss the remaining charges pending against him in the instant case, i.e., the charges set forth in counts VIII, IX, X and XIV of the indictment. (RT 72-78; CT 49.) After petitioner entered his guilty plea, the trial judge stated that if either side chose to call him as a witness in the then pending trial of codefendant Ronald Silverton, petitioner must cooperate in a reasonable and truthful manner with either side in the case. Petitioner stated that he would cooperate. The trial judge proceeded to continue petitioner's case for the probation and sentencing hearing. (RT 77-78; CT 49.)

Subsequent to entering his guilty plea but before petitioner was sentenced in the instant case, petitioner testified at the trial of codefendant Ronald Silverton. (*See* SRT 1630, et seq.; CT 50.)

Subsequent to his having testified at codefendant Silverton's trial, petitioner appeared in the trial court for the probation and sentencing hearing in the instant case. Proceedings were suspended and petitioner was granted probation for a period of three years on condition that he spend the first nine months in county jail. The judge recommended that petitioner be placed in a work furlough program. On motion of the People the remaining counts of the indictment in which petitioner was charged, i.e., counts VIII through X and XIV, were dismissed in the interest of justice. (CT 50.)

ARGUMENT

I.

PETITIONER'S CLAIM CONCERNING DENIAL OF HIS RIGHT TO ASSISTANCE OF COUNSEL AND INFRINGEMENT OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION IS MOOT

Petitioner contends that when he testified at the trial of codefendant Silverton, the trial judge should have advised him of his right to be represented by counsel and of his privilege against self-incrimination and that the judge deprived him of his right to counsel. Petitioner in essence asserts he should have been advised of his right to counsel and his privilege against self-incrimination and allowed to have his counsel present for the following reasons: (1) the judge who took petitioner's guilty plea and sentenced him in the instant case was the same judge who presided at codefendant Silverton's trial, and while petitioner was testifying at the Silverton trial, the judge made various comments to the effect that petitioner's testimony at the Silverton trial would adversely affect petitioner insofar as the judge's subsequent determination of the sentence to be imposed on petitioner in the instant case; (2) petitioner was still in jeopardy with respect to count I of the indictment, to which he had pleaded guilty, when he testified at codefendant Silverton's trial since he had not yet been sentenced on count I; and (3) by testifying at codefendant Silverton's trial, he was placed in a position of jeopardy with respect to those charges which were still pending in the instant case after he had pleaded guilty to count I of the indictment, i.e., the charges in counts VIII through X and XIV of the indictment. (Petn., pp. 2-4, 12-16.)

For the reasons set forth below, respondent submits petitioner's claim that while testifying at codefendant Silverton's trial he should have been advised of his right to be represented by counsel and his privilege against self-incrimination and was entitled to be represented by counsel is moot.

As part of the plea bargain pursuant to which petitioner pleaded guilty to the felony of conspiring to commit various misdemeanors as charged in count I of the indictment, it was agreed that petitioner would be placed on probation for a period of time to be determined by the trial court and that as a condition of probation petitioner could be sentenced to up to one year in county jail. (RT 75.) At petitioner's subsequent probation and sentencing hearing, proceedings were suspended and petitioner was granted probation for a period of three years on condition that he spend the first nine months in county jail. (RT 82; CT 50.) After petitioner had served eight and one half months of the aforementioned nine-month county jail term ordered by the trial judge as a condition of probation, and subsequent to the California Supreme Court's denial of petitioner's petition for hearing herein, the trial judge suspended the sentence and terminated petitioner's probation. (Appendix to Petition, pp. 53, 55, 57.)

Since the trial judge has suspended the jail sentence imposed on petitioner as a condition of probation and has also terminated petitioner's probation, petitioner obviously can no longer be further incarcerated, either in jail or in prison, on his conviction in the instant case. Therefore, since petitioner cannot spend any additional time in custody on his conviction herein, petitioner's claim that during his testimony at the trial of codefendant Silverton he should have been advised by the trial judge of his right to

counsel and privilege against self-incrimination and been represented by counsel is moot since the claim does not challenge the validity of petitioner's conviction but only his sentence. It simply no longer matters whether petitioner should have been advised by the judge and represented by counsel as he asserts, since even if he should, he cannot be prejudiced since he will serve no more time in custody in the instant case. Therefore petitoner's claim concerning his right to counsel and privilege against self-incrimination should be summarily dismissed. (*Ex Parte Baez* (1900) 177 U.S. 378, 387-390; *Wainwright v. Rewis* (5th Cir. 1973) 486 F.2d 306, 307; *Butts v. Wainwright* (5th Cir. 1968) 402 F.2d 834, 835.)

Respondent further notes that petitioner has failed to establish that he was prejudiced insofar as the sentence imposed on him herein by the trial judge because the judge did not advise him when he testified at codefendant Silverton's trial of his right to counsel and privilege against self-incrimination or because he was not represented by counsel at the Silverton trial.

While the trial judge did indicate during the course of petitioner's testimony at the Silverton trial that portions of petitioner's testimony could influence the judge's imposition of sentence in the instant case, this was stated in connection with the fact that at the Silverton trial petitioner disclaimed guilt in the instant case notwithstanding his admission of guilt when he had previously entered his guilty plea to count I of the indictment pursuant to the plea bargain. (SRT 1687-1690, 1715-1719, 1888-1889, 1896, 2001-2016A; *see* RT 72-75.) However, nothing in the record of petitioner's probation and sentencing hearing indicates that the trial judge was in fact influenced by the nature of petitoner's testimony at the Silverton trial to

impose a harsher sentence on petitioner than the judge would have imposed had petitioner not testified the way he did at the Silverton trial. (*See* RT 79-83.) On the contrary, at the probation and sentencing hearing, neither petitioner nor his counsel, Mr. Dobbs, in any way indicated that the trial judge was biased against petitioner by virtue of petitioner's testimony at the Silverton trial or would tend to impose a harsher sentence on petitioner because of said testimony. On the contrary, petitioner's counsel indicated there was no legal cause why sentence should not be pronounced at that time. (RT 79.)

In support of his position, petitioner points out that during the course of his testimony at codefendant Silverton's trial, the prosecutor asked the trial judge to counsel petitioner on the law of perjury and thereafter counsel for both parties approached the bench and the judge stated:

> "And it goes without saying that as far as Mr. Wilkes is concerned, if on one occasion he says, yes, he admits the truth of the charge and if on another occasion, he says, 'I admitted it but I'm really saying that I didn't do it,' that's up to him.
>
> "And that would certainly have some effect on the court's thinking processes as to what the defendant's state of mind is when I try to decide what would be appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1890-1891.)

Petitioner further notes that a short time later at the Silverton trial the prosecutor indicated he thought petitioner was perjuring himself and petitioner then asked if it would be advisable for him to have his attorney present in court and the judge responded, "I don't think so at this particular moment." (SRT 1893-1895.) The foregoing

colloquy concerning whether petitioner was perjuring himself, when viewed in context, did not indicate that the trial judge would impose a harsher sentence on petitioner because of the nature of his testimony. Actually, the judge stated that he did not think there was any big problem regarding perjury by petitioner since petitioner was not under oath when he made the statements (i.e., his guilty plea herein) as to which he was being questioned at the Silverton trial. (SRT 1891, 1895.) Since the judge felt petitioner was not perjuring himself, there manifestly was nothing improper in the judge advising petitioner, in response to petitioner's question, that it was unnecessary for petitioner to have his attorney present in court at that time.

Petitioner in additional support of his argument refers to several statements made during the course of his testimony at the Silverton trial by himself, the trial judge and counsel for both sides. (Petn., pp. 8-10.) However, nothing in any of these statements indicated bias on the part of the judge against petitioner in any manner, including the sentencing of petitioner in the present case.

Respondent further submits that the actual sentence imposed on petitioner by the trial judge clearly demonstrates petitioner was not prejudiced because the judge did not during codefendant Silverton's trial advise petitioner of his right to counsel and privilege against self-incrimination or tell him he should have counsel present. Petitioner was not prejudiced with respect to count I of the indictment since the trial judge's granting petitioner probation for three years on count I on condition that he spend the first nine months in county jail was within the terms of the plea bargain pursuant to which petitioner pleaded guilty to count I. (RT 72-78; CT 50.) Moreover, since counts VIII

through X and XIV of the indictment were dismissed at the probation and sentencing hearing herein, petitioner manifestly was not prejudiced with regard to those counts. (CT 50.)

Respondent finally submits the trial judge was not legally required to advise petitioner during his testimony at codefendant Silverton's trial of his right to counsel or privilege against self-incrimination or to allow petitioner to be represented by counsel.

The privilege against self-incrimination extends to answers that would in themselves support a conviction of a crime and also embraces answers which would furnish a link in the chain of evidence needed to prosecute the witness for a crime. However, the privilege against self-incrimination is confined to instances where a witness has reasonable cause to apprehend danger from a direct answer. A witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of self-incrimination. It is for the trial court to determine whether a witness' claim of self-incrimination is justified. (*Hoffman v. United States* (1951) 341 U.S. 479, 486.)

In the instant case, any testimony petitioner gave at the trial of codefendant Silverton would not support a conviction or furnish a link in the chain of evidence needed to prosecute petitioner in the instant case since prior to testifying at the Silverton trial, petitioner had pleaded guilty herein. Moreover, as demonstrated above by respondent, sentence was not imposed on petitioner by reason of any testimony he gave at the Silverton trial. Rather, sentence was imposed solely by reason of petitioner's prior voluntary plea of guilty to count I of the

indictment. Petitioner's guilty plea removed him from the protection against self-incrimination afforded by the Fifth Amendent to the United States Constitution. The plea of guilty was an admission of every element of the crime of conspiring to commit various misdemeanors as charged in count I of the indictment and petitioner was not subjected to any additional prosecutional penalty because of his testimony at the Silverton trial, as the record reflects that the remaining counts of the indictment charged against petitioner were properly dismissed at the probation and sentencing hearing, the sentence imposed was within the terms of the plea bargain entered into by petitioner, and there is no evidence the trial judge imposed a harsher sentence on petitioner than he would have had petitioner not given the testimony he did at codefendant Silverton's trial. (*People v. Stewart* (1969) 1 Cal. App.3d 339, 343, 81 Cal. Rptr. 562, 564-565.)

Since petitioner's testimony at the Silverton trial was not subject to his invocation of the privilege against self-incrimination, the trial judge had no duty to advise petitioner of the privilege or his right to representation by counsel or to allow petitioner to have his attorney present for the purpose of protecting petitioner against incriminating himself. However, even assuming, arguendo, that petitioner could properly have invoked his privilege against self-incrimination in regard to some of his testimony at the Silverton trial, petitioner in fact was aware of the privilege and his right to representation of counsel in view of the circumstance that while testifying at the Silverton trial, he asked the trial judge whether it would be advisable for him to have his attorney present in court. (SRT 1895.)[3] However, the trial judge, in his function as

[3]Petitioner actually had his attorney, Mr. Dobbs, present in court during at least a portion of his testimony in the Silverton trial. (SRT 1983-1984, 2016A-2019.)

the trier of fact on the matter, in essence determined that the privilege against self-incrimination did not apply to petitioner's testimony when he advised petitioner that it would not be necessary for petitioner to have his attorney present in court. (SRT 1895.)

In view of the foregoing, petitioner's claim concerning his privilege against self-incrimination and right to counsel at codefendant Silverton's trial is moot as well as without merit, and petitioner has shown no prejudice.

II.

PETITIONER WAS PROPERLY CONVICTED OF CONSPIRACY TO VIOLATE FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

Petitioner pleaded guilty as charged in count I of the indictment to the crime of conspiracy to commit the misdemeanors of violation of Civil Code sections 224p and 224q; violation of Health and Safety Code sections 1310, 1350, 1508 and 1540; and violation of Penal Code section 273, subdivision a. (CT 1-2, 49.)

Petitioner claims that the portion of his conviction for conspiracy to violate Health and Safety Code section 1310, a statute which has been repealed, under count I of the indictment constituted the unconstitutional application of an ex post facto law to him. Petitioner further claims that even if former Health and Safety Code section 1310 was not ex post facto as applied to him, then the repeal on January 1, 1974, of former section 1310 before petitioner's conviction herein had been reduced to final judgment on appeal requires reversal of his conviction for conspiracy to violate that section. (Petn., pp. 4-5, 16-19.)

For the reasons discussed below, respondent submits

petitioner was properly convicted and punished for violation of former Health and Safety Code section 1310.

In arguing that his conviction for conspiring to violate former Health and Safety Code section 1310 constituted application of an ex post facto law to him, petitioner relies on the following statement made by the California Court of Apeal in affirming petitioner's conviction under count I of the indictment:

> "The prosecution of appellant Wilkes for violation of former section 1310 of the Health and Safety Code (maintaining homefinding agency [placing children for adoption] without license) was commenced before the effective date of that section on January 1, 1974." (Petn., p. 17; *see* Appendix to Petition, p. 9.)

The foregoing statement by the Court of Appeal to the effect that prosecution of petitioner for conspiracy to violate former Health and Safety Code section 1310 was commenced before the "effective date" of that section on January 1, 1974, is erroneous. As petitioner correctly points out, the prosecution herein commenced on June 14, 1974, when the indictment charging petitioner was returned by the Grand Jury and filed in the trial court. (Petn., p. 6; CT 1-2.) Therefore, it is clear that the prosecution herein commenced well after January 1, 1974.

Petitioner further argues, however, that since former Health and Safety Code section 1310 only took effect on January 1, 1974, it was an ex post facto law as applied to him since count I of the indictment alleged that the conspiracy charged therein took place between July 1973 and June 11, 1974, and thus former section 1310 was not in effect during the portion of the conspiracy between the period July 1, 1973, through December 31, 1973. (Petn., p. 16; *see* CT 1-2.) However, a distinction must be drawn between the "effective date" and "operative date" of section 1310 as those terms are used in statutory interpretation. (*People v. Webb Bros.* (1934) 139 Cal. App. 334, 336, 34 P.2d 175, 176; 56 Ops. Cal. Atty. Gen. 176-180 (1973); *see also County of Los Angeles v. Lamb* (1882) 61 Cal. 196.) Therefore, with reference to the period of effective operation of former section 1310, it is necessary to examine the legislative history of the statute.

As amended on November 27, 1972, former section 1310 was part of Statutes 1972, chapter 1148, section 3, subchapter 2, article 4, page 2230. Section 20 of chapter 1148 provided that the foregoing provisions, including section 1310, "shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative." (Stats. 1972, ch. 1148, Art. 8, § 20, p. 2243.) Pursuant to Statutes 1971, chapter 1217, section 3.5, Reorganization Plan No. 1 of 1970[4] became operative on July 1, 1973. (*See* Statutory Record, 1969-1972, Stats. 1972, p. 511.) According to Article IV, section 8, subd. (a) of the California Constitution as it then applied, the "effective date" of these 1972 statutes, in contrast to their legislatively-prescribed "operative date," was sixty-one days after the final adjourment of the 1972 regular session or March 7, 1973.

---

[4]The 1970 Reorganization Plan No. 1 provided for comprehensive executive reorganization by vesting the newly-formed State Department of Health with omnibus authority derived from the consolidation of various Human Relations agencies. (Stats. 1971, ch. 1593, part 1, ch. 1, § 103, p. 3238.) The authority for amended section 1310 of chapter 1148 was obviously related to the jurisdiction of the new State Department of Health. This explains why the operative date for the two sets of provisions were keyed to each other.

Thus, the effective date of the statutes enacted in the 1972 legislative session was not affected by the November 7, 1972, amendment to Article IV of the State Constitution which provided that all statutes, except those specified, would become effective on January 1 next following a 90-day period from the enactment date. This resulted from the distinction between an enactment's effective, as opposed to operative date; a distinction applicable to constitutional amendments as well as statutes. Amended Article IV, section 8(c) became effective on November 8, 1972 (Cal. Const., Art. XVIII, § 4), but it did not become operative until January 8, 1973, with the start of the 1973 session. The laws emanating from the 1973 session would be the first to have effective dates calendared according to the amended constitutional provision. (56 Ops. Cal. Atty. Gen., *supra,* at pp. 176-180 and authorities therein cited.)

The operative period of former Health and Safety Code section 1310 therefore commenced on July 1, 1973, and continued until the statute's repeal and re-enactment in amended form by Statutes 1973, chapter 1202, section 1 and chapter 1203, section 4, and section 1508 respectively. (*See* Statutory Record, 1969-1973, Stats. 1973, p. 537.) Since the provisions of the 1972 constitutional amendment to Article IV, section 8(c) (1) did apply to the 1973 enactment, and because there was no express operative date prescribed, new Health and Safety Code section 1508 became effective and operative on January 1, 1974. Former Health and Safety Code section 1310 was therefore operative and in effect from July 1, 1973 to December 31, 1973. Consequently, charging petitioner in count I of the indictment with conspiracy to violate former section 1310 during the period, inter alia, of July 1, 1973, through December 31, 1973, was a proper pleading and formed a valid basis for petitioner's conviction. Petitioner was not subjected to an ex post facto law or ex post facto

punishment.

There is also no merit to petitioner's additional claim that his conviction for conspiracy to violate former Health and Safety Code section 1310 was improper because that section was repealed on January 1, 1974, prior to petitioner's conviction becoming final on appeal.

In *People v. Rossi* (1976) 18 Cal.3d 295, 134 Cal. Rptr. 64, 555 P.2d 1313, relied on by petitioner (Petn., p. 18), it was held that when the Legislature repeals a criminal statute or otherwise removes the state's condemnation from conduct that was formerly deemed criminal, such action requires reversal of a criminal prosecution or conviction therefor which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.

Respondent submits the rule of *People v. Rossi, supra,* requiring dismissal of a pending criminal proceeding which has not yet reached final disposition when the Legislature repeals the criminal statute that was the subject of the violation charged in the proceeding is inapplicable to petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310 by virtue of the consecutive repeal and reenactment of the provisions of former section 1310 pertaining to homefinding agencies and the saving clause of California Government Code section 9608.

Unlike the facts which obtained in *People v. Rossi, supra,* the record of the consecutive legislative acts which repealed former Health and Safety Code section 1310 and simultaneously transferred its homefinding provisions to new Health and Safety Code section 1508 indicates no intent by the Legislature to either decriminalize unlicensed homefinding activities or mitigate the punishment

therefor. Rather, the Legislature unequivocally demonstrated an intent to maintain the sanctions for such unlawful activities.

An examination of the relevant legislative history indicates that in the course of codifying the new California Community Care Facilities Act (Stats. 1973, ch. 1203, §§ 3 and 4, subch. 3), the provisions of former section 1310 pertaining to homefinding agencies were transferred to the new Act along with a duplication of the punishment provisions of former section 1350. For this reason, application of the theory of remission set forth in *People v. Rossi, supra,* to petitioner's conviction for conspiracy to violate, inter alia, former Health and Safety Code section 1310 would be incorrect.

As part of the consolidation of statutes into the new California Community Care Facilities Act, the homefinding provisions of former section 1310 were simultaneously repealed and then reenacted and transferred from Division 2, chapter 2, to Division 2, chapter 3, of the Health and Safety Code. (Stats. 1973, ch. 1202, § 1 and ch. 1203, subch. 3.)

Indeed, the sole changes in the substance of former section 1310 effected by the transfer of its homefinding provisions to new section 1508 were limited to minor changes to remove the age limit of persons who could be the objects of unlicensed homefinding activities and to include corporate associations within the range of proscription.[5] Violation of former section 1310 was punishable by a fine not exceeding $500 or by imprisonment in

[5]Former section 1310 provided in pertinent part:

> "No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter. . . . "

county jail for a period not to exceed 180 days or by both such fine and imprisonment pursuant to former section 1350. Pursuant to present section 1540, violation of section 1508 is punishable by the same penalty.

The legislation which repealed former section 1310 was thus tandem to that which incorporated its former provisions under new section 1508. (*See* fn. 5, *supra.)*

The concurrence between the repealing act and the act which transferred the homefinding provisions to the Community Care Facilities Act leads to the obvious conclusion that in order to preserve prosecutions for violation of former Health and Safety Code section 1310

Former section 1250(a) provided in relevant part:

> " 'Facility' means any hospital, institution, boarding home . . . homefinding agencies. . . ."

Former section 1250(d) provided:

> " 'Homefinding agencies' means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption."

Former section 1250 was repealed by the same comprehensive legislation that repealed former section 1310. (Stats. 1973, ch. 1202, § 1.)

Current section 1508 provides in pertinent part:

> "No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter."

Current section 1502 defines "community care facility" as including any facility, place or building which is maintained and operated to provide homefinding agencies for children, adults, or children and adults. Section 1502(c) specifically defines "homefinding agency" as "any individual or organization engaged in finding homes or other places of placement of persons of any age for temporary or permanent care or adoption."

instituted prior to the effective date of the statute's repeal on January 1, 1974, the Legislature acted in reliance on the general saving clause of Government Code section 9608. (*See People v. Kuhns* (1976) 61 Cal. App.3d 735, 760, 132 Cal. Rptr. 725, 740; 2A Sutherland, *Statutory Construction,* (4th ed. 1973) § 47.13, pp. 92-93.)

Even in the absence of the saving clause of Government Code section 9608, petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310 was proper under the holding of *In re Dapper* (1969) 71 Cal.2d 184, 77 Cal. Rptr. 897; 454 P.2d 905. Invalidating an argument essentially identical to that asserted by petitioner herein, the *Dapper* court stated:

> "It is well established that the rule which bars prosecution under a repealed law for offenses occuring before repeal does not apply 'where there is an outright repeal and a substantial reenactment,' because it will be presumed that the legislative body 'did not intend that there should be a remission of crimes not reduced to final judgment.' [Citation.] 'When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because obviously, in such event the intent of the Legislature is . . . not to affect the continuous operation of the law.'

> [Citations.]" (71 Cal.2d at p. 189.)[6]

There is no evidence whatsoever that the Legislature manifested any intent to either decriminalize unlicensed homefinding activities or mitigate the punishment therefor. Consequently, petitioner's conviction for conspiracy, inter alia, to violate former Health and Safety Code section 1310 is valid by virtue of that section's substantial reenactment in present Health and Safety Code section 1508.[7]

Even assuming, arguendo, that petitioner is correct in his claim that his conviction for conspiracy to violate former Health and Safety Code section 1310 was improper, repondent further submits that reversal of petitioner's conviction on count I of the indictment is not warranted. Petitioner pleaded guilty to the crime of conspiracy to commit seven misdemeanors, including former Health and Safety Code section 1310, as charged in count I; the allegations that petitioner conspired to

---

[6] *See also* 77 A.L.R.2d 336, 347. It is stated therein:

> "The most obvious instance in which to apply the rule that a simultaneous repeal and re-enactment of a statute is not a true repeal but is a continuation of the original statute is the case in which the legislature revises and consolidates . . . statutes in a particular field, and purports to repeal all prior laws . . . in the particular field."

[7] In his Petition for Writ of Certiorari, petitioner cites and relies on the unpublished opinion of the California Court of Appeal, Second Appellate District, Division Four, in *People v. Silverton,* 2d Crim No. 28211. (Petn., pp. 10-11; Appendix to Petn., pp. 22-24.) Respondent submits petitioner's citation of and reliance upon the unpublished decision in the *Silverton* case is inappropriate and of no effect. An unpublished appellate court opinion is of no precedential effect. *(Heaton v. Marin County Employees Retirement Board* (1976) 63 Cal. App.3d 421, 431, 133 Cal. Rptr. 809, 814; *Powers v. Sissoev* (1974) 39 Cal. App.3d 865, 872 fn. 8, 114 Cal. Rptr. 868, 873.)

commit various felonies having been deleted from count I. (CT 49.) In the event that the portion of the plea admitting guilt to conspiring to violate former section 1310 is not valid, this would not render petitioner's entire guilty plea invalid. Rather, the plea of guilt as to conspiring to commit those six misdemeanors other than former Health and Safety Code section 1310 set forth in count I would still be valid and that portion of the plea as to conspiracy to violate former section 1310 would be severable. A plea of guilty amounts to an admission of every element of the crime charged and is the equivalent of a conviction. Nothing remains but to render judgment and determine punishment. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) Therefore, in the event this Honorable Court should determine to be improper the portion of petitioner's conviction for conspiracy to violate former Health and Safety Code section 1310, it is submitted it would be appropriate to strike that portion of petitioner's guilty plea relating only to the admission to conspiring to violate former section 1310 and affirm the remainder of petitioner's conviction.

CONCLUSION

For the foregoing reasons, it is requested that the petition for writ of certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
ROY C. PREMINGER,
Deputy Attorney General

Attorneys for Respondent

APPENDIX TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

CALIFORNIA STATS. 1972,
CH. 1148, ART. 8, SECTION 20, P. 2243.

This act shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative.

CALIFORNIA STATS. 1971, CH. 1593, PART 1, CH. 1, SECTION 103, P. 3328.

103. The State Department of Health succeeds to and is vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the Department of Mental Hygiene, the Department of Public Health, the Department of Health Care Services, the Department of Social Welfare, with respect to social service functions thereof, the Department of Rehabilitation, with respect to its alcoholism program, the Department of Consumer Affairs with respect to the healing arts boards and the State Board of Public Health, with respect to its powers to issue, amend, and revoke, rules and regulations and licenses or permits.

CALIFORNIA STATUTORY RECORD, 1969-1972, STATS. 1972, P. 511.

HEALTH AND SAFETY CODE — CONTINUED

Section	*Affected by* *Year*	*Chapter*	*Effect*
	1971	1744	Am
544	1971	1744	Ad
543	1971	1744	Ad
546	1971	1744	Ad
547	1971	1744	Ad
604	1971	1744	Ad
1101	1971	1593	Am. S[468]
1102	1971	1593	Am. S[468]
1110	1969	1263	Am
	1971	1593	Am. S[468]
1110.5	1971	1593	Am. S[468]
1111	1971	1593	Am. S[468]
1112	1971	1593	Am. S[468]
1130	1971	1593	Am. S[468]
1140	1971	1593	Am. S[468]
1153	1971	1593	Am. S[468]
1155	1971	1593	Am. S[468]
1156	1971	1593	Am. S[468]
1157	1971	1593	Am. S[468]
1170	1970	1187	Ad
	1972	1255	R.S*
1171	1970	1187	Ad
	1971	21	Am
	1972	1255	R.S*
1173	1970	1187	Ad
	1972	1255	R.S*
1175	1971	1781	Ad
1176	1971	1781	Ad

Section	Affected by Year	Chapter	Effect
1177	1971	1781	Ad
1178	1971	1781	Ad
1179	1971	1781	Ad
1180	1971	1781	Ad
1181	1971	1781	Ad
1182	1971	1781	Ad
1200.5	1970	635	Am
1203	1971	1120	Am
	1971	1593	Am S[468 468]
1204	1971	1593	Am. S[468]
1210	1971	1593	Am. S[468]
1213	1971	1593	Am. S[468]
1225	1972	1425	Ad
1229	1972	1148	Am[468]
1236	1971	1593	Am. S[468]
1237	1971	1593	Am. S[468]
1250	1972	1148	Ad[468]
1270	1972	1148	Ad[468]
1271	1972	1148	Ad[468]
1272	1972	1148	Ad[468]
1273	1972	1148	Ad[468]
1274	1972	1148	Ad[468]
1290	1972	1148	Ad[468]
1291	1972	1148	Ad[468]
1292	1972	1148	Ad[468]
1310	1972	1148	Ad[468]
1311	1972	1148	Ad[468]
1312	1972	1148	Ad[468]
1313	1972	1148	Ad[468]
1314	1972	1148	Ad[468]
1315	1972	1148	Ad[468]
1330	1972	1148	Ad[468]

Section	Affected by Year	Chapter	Effect
1331	1972	1148	Ad[468]
1332	1972	1148	Ad[468]
1333	1972	1148	Ad[468]
1334	1972	1148	Ad[468]
1335	1972	1148	Ad[468]
1336	1972	1148	Ad[468]
1338	1972	1148	Ad[468]
1339	1972	1148	Ad[468]
1340	1972	1148	Ad[468]
1341	1972	1148	Ad[468]
1342	1972	1148	Ad[468]
1342.5	1972	1148	Ad[468]
1343	1972	1148	Ad[468]
1344	1972	1148	Ad[468]
1345	1972	1148	Ad[468]
1346	1972	1148	Ad[468]
1347	1972	1148	Ad[468]
1348	1972	1148	Ad[468]
1348.5	1972	1148	Ad[468]
1350	1972	1148	Ad[468]
1351	1972	1148	Ad[468]
1352	1972	1148	Ad[468]
1353	1972	1148	Ad[468]
1354	1972	1148	Ad[468]
1370	1972	1148	Ad[468]
1371	1972	1148	Ad[468]
1372	1972	1148	Ad[468]
1373	1972	1148	Ad[468]
1374	1972	1148	Ad[468]
1390	1972	1148	Ad[468]
1391	1972	1148	Ad[468]
1392	1972	1148	Ad[468]

Section	Affected by Year	Chapter	Effect
1393 Div.2. Ch. 2. Art. 1 (heading)	1972	1148	Ad[468]
	1970	1111	Ad

*Effective immediately.
[82]Not operative.
[468]Operative on July 1, 1973.

CALIFORNIA CONSTITUTION, ARTICLE IV, SECTION 8

Prior to November 7, 1972, Article IV, section 8 of the California Constitution reads as follows:

"§ 8. Bills; procedure; effective date of statutes; urgency measures

Sec. 8. (a) At regular sessions no bill other than the budget bill may be heard or acted on by committee or either house until the 31st day after the bill is introduced unless the house dispenses with this requirement by rollcall vote entered in the journal, three fourths of the membership concurring.

(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.

(c) No statute may go into effect until the 61st day after adjournment of the regular session at which the bill was passed, or until the 91st day after adjournment of the special session at which the bill was passed, except statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes.

(d) Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring. An urgency statute may not create or abolish any office or change the salary, term, or duties of any office, or grant any franchise or special privilege or create any vested right or interest."

On November 7, 1972, Article IV, section 8 was amended by deletion of former subdivision c and addition of the following as new subdivision c:

"(c) (1) Except as provided in paragraph (2) of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed.

(2) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes shall go into effect immediately upon their enactment."

CALIFORNIA CONSTITUTION, ARTICLE XVIII, SECTION 4

Article XVIII, section 4 of the California Constitution pertaining to amendment and revision of the California Constitution by the state Legislature provides as follows:

"§4. Submission to electors; effective date; conflicting provisions

Sec. 4. A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."

CALIFORNIA STATUTORY RECORD, 1969-1973, STATS. 1973, P. 537.

HEALTH AND SAFETY CODE — CONTINUED

Section	Affected by Year	Chapter	Effect
1265.7	1973	1202	Ad
1265.8	1973	1202	Ad
1266	1973	1202	Ad
1267	1973	1202	Ad
1268	1973	1202	Ad
1269	1973	1202	Ad
1270	1972	1148	Ad
	1973	1202	R & Ad
1271	1972	1148	Ad
	1973	1202	R
1272	1972	1148	Ad
	1973	1202	R & Ad
1273	1972	1148	Ad
	1973	1202	R & Ad
1274	1972	1148	Ad
	1973	1202	R & Ad
1275	1973	142	Ad* [468]
	1973	1202	Ad
1276	1973	1202	Ad
1277	1973	1202	Ad
1278	1973	1202	Ad
1279	1973	1202	Ad
1280	1973	1202	Ad
1282	1973	1202	Ad
1290	1972	1148	Ad
	1973	1202	R & Ad
129!	1972	1148	Ad
	1973	1202	R & Ad

Section	Affected by Year	Chapter	Effect
1292	1972	1148	Ad
	1973	1202	R & Ad
1293	1973	1202	Ad
1294	1973	1202	Ad
1295	1973	1202	Ad
1296	1973	1202	Ad
1297	1973	1202	Ad
1298	1973	1202	Ad
1300	1973	1202	Ad
1305	1973	1202	Ad
1306	1973	1202	Ad
1307	1973	1202	Ad
1308	1973	1202	Ad
1310	1972	1148	Ad
	1973	1202	R
1311	1972	1148	Ad
	1973	1202	R
1312	1972	1148	Ad
	1973	1202	R
	1973	1203	Am[82]
1313	1972	1148	Ad
	1973	1202	R
1314	1972	1148	Ad
	1973	1202	R
1315	1972	1148	Ad
	1973	1202	R & Ad
1316	1973	1202	Ad
1317	1973	1202	Ad
1318	1973	1202	Ad
1330	1972	1148	Ad
	1973	1202	R

Section	Affected by Year	Chapter	Effect
1331	1972	1148	Ad
	1973	1202	R
1331.1	1973	1181	Ad*
	1973	1202	R
1332	1972	1148	Ad
	1973	1202	R
1333	1972	1148	Ad
	1973	1202	R
1334	1972	1148	Ad
	1973	1202	R
1335	1972	1148	Ad
	1973	1202	R
1336	1972	1148	Ad
	1973	1102	Am*
	1973	1202	R
1338	1972	1148	Ad
	1973	1202	R
1339	1972	1148	Ad
	1973	1202	R
1340	1972	1148	Ad
	1973	1202	R
1341	1972	1148	Ad
	1973	1202	R
1342	1972	1148	Ad
	1973	1202	R
1342.5	1972	1148	Ad
	1973	1202	R
1343	1972	1148	Ad
	1973	1202	R
1344	1972	1148	Ad
	1973	1202	R

Section	Affected by Year	Chapter	Effect
1345	1972	1148	Ad
	1973	1202	R
1346	1972	1148	Ad
	1973	1202	R
1347	1972	1148	Ad
	1973	1202	R
	1973	1204	Am[82]
1348	1972	1148	Ad
	1973	1202	R

*Effective immediately.

[461]In the event any other act or acts of the 1971 Regular Session have any effect on any section of any code or statute affected by this act, the provisions of such act or acts shall prevail over the conflicting provisions of this act.

[468]Operative on July 1, 1973.

CALIFORNIA STATS. 1973, CH. 1203, SECTIONS 3 AND 4, SUBCH. 3.

SEC. 3. Chapter 3 (commencing with Section 1500) of Division 2 of the Health and Safety Code is repealed.

SEC. 4. Chapter 3 (commencing with Section 1500) is added to Division 2 of the Health and Safety Code, to read:

CHAPTER 3. CALIFORNIA COMMUNITY CARE FACILITIES ACT

Article 1. General Provisions

1500. This chapter shall be known and may be cited as the California Community Care Facilities Act.

CALIFORNIA STATS. 1973 CH. 1202, SECTION 1

CHAPTER 1202

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, as added by Chapter 1148 of the Statutes of 1972, is repealed.

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

§ 1310. Persons, entities, and activities subject to license requirement.

No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1250 (a) AND (d)

§ 1250. Governing definitions.

As used in this chapter:

(a) "Facility" means any hospital, institution, boarding home or other place for the care of persons, homefinding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, mentally retarded persons and other incompetent persons.

(d) "Homefinding agencies" means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1508

§ 1508. Necessity of Licensure; temporary permit; county facilities

No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter.

No person, firm, partnership, association or corporation within the state shall provide specialized services within a community care facility in this state, without first obtaining a special permit therefor as provided in this chapter.

Except for a juvenile hall operated by a county, this section shall apply to community care facilities directly operated by a county. Each county operated community care facility shall comply with the standards established by the director for community care facilities.

CALIFORNIA HEALTH AND SAFETY CODE SECTION § 1502

§ 1502. Definitions

As used in this chapter, "community care facility" means any facility, place, or building which is maintained and operated to provide nonmedical residential care, day care, or homefinding agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, or incompetent persons, and includes the following:

(a) "Residential facility" means any family home, group care facility, or similar facility determined by the director, for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual.

(b) "Day care center" means any facility which provides nonmedical care to persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis.

(c) "Homefinding agency" means any individual or organization engaged in finding homes, or other places for placement of persons of any age for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1540

§ 1540. Violations of chapter or regulations; misdemeanor

Any person who violates any of the provisions of this chapter, or who willfully or repeatedly violates any rule or regulation promulgated under this chapter, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars ($500) or by imprisonment in the county jail for a period not to exceed 180 days, or by both such fine and imprisonment.

CALIFORNIA GOVERMENT CODE SECTION 9608

§ 9608. Termination or suspension of law creating offense. The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.

In the Supreme Court of the United States

October Term — 1977
No. 77-1629

Supreme Court, U. S.
FILED
SEP 22 1978
MICHAEL RODAK, JR., CLERK

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

DAVID SILVERTON, Esq.
3600 Wilshire Boulevard
Suite 220
Los Angeles, California 90010
(213) 381-7511

Attorney for Petitioner

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

Page

I.

Petitioner Was Denied Assistance Of Counsel, And His Constitutional Right And Privilege Against Self-Incrimination Was Infringed Upon 1

A. The Issue Is Not Moot 1

B. It Was Improper For The Judge Not To Heed Petitioner's Implied Request For Counsel. 3

C. Counsel For Petitioner Was Not Present During Any Of The Petitioner's Interrogation. 5

II

Petitioner Was Not Properly Convicted Of Conspiracy To Violate Former California Health & Safety Code Section 1310. 6

A. The California Court of Appeal Was Not Erroneous In Stating That "The Prosecution Of Petitioner Wilkes For Violation Of Former Section 1310 of the Health & Safety Code Was Commenced Before The Effective Date Of That Section." 6

B. Respondent's Argument As To The Effective And Operative Date Of Section 1310 Of The Health & Safety Code Is Erroneous. 8

C. The Instant Case Is Governed By The Mandate Of The Universal Common Law Rule That When The Legislature Repeals A Criminal Statute, Said Action Requires The Dismissal Of a Pending Criminal Proceeding Charging Such Conduct. 10

Conclusion 13

Appendix 15

APPENDIX

Former California Health And Safety Code Section 1250 16
Former California Health And Safety Code Section 1310 18
California Health And Safety Code Section 1502 19
California Health And Safety Code Section 1508 16

TABLE OF AUTHORITIES CITED

Cases Page

Bell v. Maryland (1964) 378 U.S. 336, 12 L. Ed.2d 822, 84 S.Ct. 1814 10
Bodinson Manufacturing Company v. Employment Commission, 17 Cal. App. 321, 109 P.2d 935 8
Fields v. Eu (1976) 18 Cal.3d 322, 134 Cal. Rptr. 367, 566 P.2d 729 ..... 8, 9
Gideon v. Wainwright (1963) 372 U.S. 335, 9 L. Ed.2d 799, 83 S.Ct. 792 5
In re Gault (1966) 387 U.S. 1, 18 L. Ed.2d 527, 87 S.Ct. 792 5
Murphy v. Waterfront Commission (1964) 378 U.S. 52, 84 S.Ct. 1518 4
People v. Kuhns (1976) 61 Cal. App.3d 735, 132 Cal. Rptr 725 ..... 10, 11
People v. Rossi (1976) 18 Cal.3d 295, 134 Cal. Rptr. 725 ..... 10, 11
Sibron v. New York (1968) U.S. 40, 20 L. Ed.2d 1917, 88 S.Ct. 1889 3

Statutes

California Government Code Section 9608 10
California Health and Safety Code
Section 1250 (former) 12, 13
Section 1310 (former) 6, 7, 8, 9, 10, 11, 12
Section 1502 ..... 11, 12, 13
Section 1508 ..... 10, 11, 12, 13

Constitutions

California Constitution, Article I, Sec. VIII(c)(1) 9

Miscellaneous Authorities

Black's Law Dictionary 7
56 Ops. Cal. Atty. Gen 176-180 8

Deerings Annotated California Codes, Health & Safety Code, sections 1508 and former 1502 11

In the Supreme Court of the United States

October Term — 1977
No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

I

PETITIONER WAS DENIED ASSISTANCE OF COUNSEL, AND HIS CONSTITUTIONAL RIGHT AND PRIVILEGE AGAINST SELF-INCRIMINATION WAS INFRINGED UPON.

A. The Issue Is Not Moot.

The respondent argues that since the trial judge has now suspended the jail sentence imposed on the petitioner as a

condition of probation and has also terminated the provision of probation, that:

> "Petitioner cannot spend any additional time in custody on his conviction . . . ." (Respondent's brief, pages 7-8).

Therefore, petitioner's claim of violation of his Fifth and Sixth Amendment rights is moot. Since the claim does not challenge the validity of petitioner's conviction, only his sentence; in the words of respondent's brief:

> "It simply no longer matters whether petitioner should have been advised by the judge (of his Fifth Amendment rights) and (given the opportunity to be) represented by counsel as he asserts, since even if he should, he cannot be prejudiced because he would spend no more time in custody in the instant case." (Respondent's brief, pages 7-8).

The three cases cited by respondent (page 8 of Respondent's brief) to support this position are not applicable since each of them deals with a situation in which the Court's decision would have no effect on the petitioner. In the instant case, Federal Judge Francis C. Whelan, on May 9, 1978, sentenced petitioner to 15 months of incarceration in a federal prison solely on the basis of the final judgment of conviction in the State Court. Part of this final judgment of conviction is the sentence. This sentence is still extant. By his own words, Federal Judge Francis C. Whelan, when sentencing petitioner on May 9, 1978, stated:

> "THE COURT: Supposing it is (referring to the court granting the instant petition for certiorari), then you come in and ask me to vacate that sentence, the sentence that I'm now going to impose." (Transcript of probation violation hearing in the Federal Court as it appears in the appendix of petitioner's petition page 40, lines 5-7).

Thus, the law applicable to this instant case is as set forth in the case of *Sibron v. New York,* 392 U.S. 40, at page 57, 20 L. Ed.2d 1917, 88 S.Ct. 1889 (1968):

". . . a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

Certainly, the Federal Court's 15 months sentence of petitioner is a serious "collateral consequence." In the event the petitioner's petition is granted, the Judge's reduction is probable because one of the considerations was the sentence of the State Court (appendix to petition, page 55, lines 1-2). If the State Court Judge would have sentenced petitioner to straight probation there is a reasonable argument that Judge Whelan would have agreed that further incarceration was not called for.

B. It Was Improper For The Judge Not To Heed Petitioner's Implied Request For Counsel.

Respondent agrues that:

> "Since the (trial) judge felt that petitioner was not perjuring himself, there manifestly was nothing improper in the judge advising petitioner, in response to petitioner's question, that it was unnecessary for petitioner to have his attorney present in court at that time." (Respondent's brief, page 10).
>
> And that "any testimony petitioner gave at the trial of co-defendant Silverton would not support a conviction or furnish a link in the chain of evidence needed to prosecute petitioner in the

> instant case since prior to testifying at the Silverton trial, petitioner had pleaded guilty herein." (Respondent's brief, page 11).

The above argument avoids the contention of petitioner that the trial judge probably imposed a harsher sentence on petitioner than he would have had petitioner not given the testimony he did at co-defendant Silverton's trial.

The scope of the privilege against self-incrimination is comprehensive, as Justice White, concurring, stated in *Murphy v. Waterfront Commission,* 378 U.S. 52 at page 94, 84 S.Ct. 1518 (1964):

> "The privilege can be used in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, . . . it protects *any disclosures* which the witnesses may reasonably apprehend *could be used in the criminal prosecution* . . . ." (Emphasis Added).

The use of petitioner's responses as a witness by the Court in determining petitioner's sentence in another matter, was a use in a criminal prosecution. This is a logical conclusion because as stated in *In Re Gault,* 387 U.S. 1, at page 49, 18 L. Ed.2d 527, 87 S.Ct. 1428 (1966):

> "The availability of the privilege does not turn upon the type of proceedings in which it is invoked, but upon the . . . exposure which it invites."

In the instant case the use of the testimony exposed petitioner to a greater punishment for the crime of which he was previously convicted.

Such exposure, the greater punishment, is use in a criminal prosecution. To make the privilege efficacious for petitioner, his question to the Judge as to whether he needs

counsel, should have been responded to affirmatively, since petitioner's constitutional rights permits him counsel in situations where his testimony may be used in a criminal prosecution. *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed.2d 799, 83 S.Ct. 792 (1963).

C. Counsel For Petitioner Was Not Present During Any Of The Petitioner's Interrogation.

In Footnote 3 of its brief, respondent raises the point that,

> "petitioner had his attorney, Mr. Dobbs, present in court during at least a portion of his testimony in the Silverton trial (Silverton's Reporter's Transcript 1983-1984, 2016A-209)."

An examination of the cited portion of the transcript will verify that Mr. Dobbs was not present during any of the interrogation of petitioner. (This interrogation is reported in the Silverton's Reporter's Transcript, page 1630-2027.) The pages cited by respondent only relate that petitioner's attorney was in the Courtroom at a noon recess when the jury was not present. However, this citation does prove that petitioner's attorney, Mr. Dobbs, could have been available for summons by the Court, or by the petitioner, if given the opportunity, to protect the rights of petitioner while he was on the witness stand.

II

PETITIONER WAS NOT PROPERLY CONVICTED OF CONSPIRACY TO VIOLATE FORMER CALIFORNIA HEALTH & SAFETY CODE SECTION 1310.

A. The California Court of Appeal Was Not Erroneous In Stating That "The Prosecution Of Petitioner Wilkes For Violation Of Former Section 1310 Of The Health & Safety Code Was Commenced Before The Effective Date Of That Section."

Respondent states that the Court of Appeal erred in stating that:

> "The prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code . . . was commenced before the effective date of that section on January 1, 1974." (Respondent's brief page 14, quoting from the opinion of the California Court of Appeal in the instant case. Said opinion is set forth in the appendix to petition and the quoted portion is set forth at page 9 thereof).

Respondent bases its claim of error on the part of the California Court of Appeal on the fact that the indictment charging petitioner was returned by the grand jury and filed in the trial court on June 14, 1974, whereas the section became effective on January 1, 1974. This assertion by respondent that the aforequoted sentence of the California Court of Appeal is erroneous does not take into consideration the fact that the statute here under consideration, former *Health & Safety Code* Section 1310, was undisputedly repealed effective January 1, 1974, under statute, Chapter 1202, enacted in the regular 1973 Session of the California Legislature.

There is no dispute concerning its repeal date. The contention of respondent it that its effective date is earlier than the activity of petitioner leading to his indictment. However, if the effective date is established as January 1, 1974, then the repeal date of the same date means that in fact, the statute was never extant, and thus, the opinion of the Court of Appeal is correct that:

> "the prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code . . . was commenced before the effective date of that session on January 1, 1974,"

More importantly respondent does not dispute that the activity for which petitioner Wilkes was being punished occured prior to the enactment of the section he is charged with violating; to wit: the indictment charges petitioner with violation of Section 1310 of the *Health & Safety Code* between July 1, 1973, and December 31, 1973 (Silverton Clerk's Transcript, page 377); but the statute was not in effect until January 1, 1974. Thus, the making of petitioner's conduct prior to January 1, 1974, criminal by virtue of passing a law on January 1, 1974, making it criminal, is an ex post facto law; that is, it is a retroactive criminal statute applying to crimes committed before its amendment, and substantially injuring the accused by punishing an act, innocent when done, or increasing the punishment, or taking away a defense, *(Black's Law Dictionary),* and as such, it is prohibited by the Federal Constitution, Article I, Sections 9 and 10.

Defendant had a right to know in advance of his acts (which took place July 1, 1973 - December 13, 1973; according to the indictment — Silverton Clerk's Transcript page 377) what acts would subject him to criminal penalties.

B. Respondent's Argument As To The Effective And Operative Date Of Section 1310 Of The Health & Safety Code Is Erroneous.

Respondent argues on pages 15 and 16 of its brief that the operative date of Section 1310 of the *Health & Safety Code* was July 1, 1973, because the effective date of the statutes enacted in the 1972 legislative session was not affected by the November 7, 1972 amendment to Article IV of the State Constitution, which provided that all statutes, except those specified, would become effective on January 1 following a 90 day period from the enactment date. (Respondent's brief, page 16). The authority that respondent cites for this argument is a 1973 opinion of the California Attorney General (page 56 Ops. Cal. Atty. Gen. 176-180), which opinion is based upon the logic that if such a difference were not concocted, the results would be, according to the writer of the opinion, different from the legislative intent.

The opinions of the California Attorney General are not of the weight or authority as those of the California Courts. *Bodinson Manufacturing Company v. Employment Com.* 17 Cal. App. 321, 109 P.2d 935. Expressly and specifically contrary to the 1973 opinion of the California Attorney General on the point here in contention is the subsequent opinion of the California Supreme Court in the case of *Fields v. Eu,* (1976), 18 Cal.3d 322, 134 Cal. Rptr. 367, 566 P.2d 729. This case states:

> *"Prior to the 1973 revision of the legislative article,* new statutes took effect 90 days after adjournment (former Article IV, Section I). In the case of regular session, this meant the statutes became operative in mid-September; . . . In 1972, the legislative article was amended to provide, inter alia, that new statutes do not take effect until the January 1 following the 90 day period after their enactment (Article IV, Section VIII. Subd.(c)(1))." (18 Cal.3d 334).

This writer italicized the words in the above quote to emphasize that the opinion of the California Supreme Court in *Fields v. Eu, supra,* expressly stated that after the 1972 revision of the legislative articles (Articles I, Section VIII(c)(1)), of the *California Constitution*, the new statutes thereafter passed took effect according to it. The unequivocal nature of this expression is further emphasized by footnote 14 in the same paragraph from which the above quote was extracted *(Fields v. Eu, supra,* at page 334.):

> "14. Thus, prior to 1972, a statute enacted . . . took effect in that year . . . but after 1972 a statute enacted . . . does not take effect until January 1 of the following year . . . "

Hence, the above demonstrates that former Health & Safety Code Section 1310 did not take effect until January 1, 1974; the same day that its repeal became effective under statute Chapter 1202, enacted in the regular 1973 Session of the California Legislature, and thus could not apply to petitioner's activity.

C. The Instant Case Is Governed by the Mandate Of the Universal Common Law Rule That When The Legislature Repeals A Criminal Statute, Said Action Requires the Dismissal Of A Pending Criminal Proceeding Charging Such Conduct.

Respondent seeks to distinguish this case as not applicable to the mandate of "a universal common law rule that when the legislature repeals a criminal statute . . . the action requires a dismissal of a pending criminal proceeding charging such conduct . . . " *(Bell v. Maryland,* 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S.Ct. 1814 (1964)). The distinction argued by respondent is based on the proposition that "the legislation which repealed former Section 1310 was tandem to that which incorporated its provisions under new Section 1508." (Respondent's brief, page 19). This proposition has been extolled by respondent's brief as extinguishing the universal common law requiring remission on two bases:

> 1) "That the California Legislature acted in reliance on the general savings clause in California Government Code Section 9608." (The authorities cited by respondent's brief for this argument is *People v. Kuhns,* (1976) 61 Cal. App.3d 735, 760, 132 Cal. Rptr. 725, 740 (Respondent's Brief 20).

However, the opinion in *Kuhns, supra,* specifically declined to explore the proposition of whether or not *California Government Code* Section 9608 abrogated the common law rule requiring a dismissal of criminal proceedings not yet final when based on an abolished statute. (See *People v. Kuhns, supra,* bottom of page 760-top of page 761).

The opinion of the California Supreme Court in *People*

v. Rossi (1976) 18 Cal.3d 295, 134 Cal. Rptr. 64, 555 P.2d 1313, decided subsequently to the decision in *Kuhns, supra,* did explore that issue and, as set forth in appellant's opening brief at pages 18-19, found that California Government Code Section 9608, did not abrogate the common law rule requiring a dismissal of criminal proceedings not yet final and based on an abolished statute.

2) Respondent's brief argues at page 20, that when a statute, although new when formed, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. To come within this argument, respondent's brief equates Section 1310 with Section 1508. However, *Health & Safety Code* Section 1508 was in effect under the section designated as *Health & Safety Code* Section 1502 at the same time as former *Health & Safety Code* Section 1310 was in effect; both Sections 1508 and 1310 being in effect at the time that defendant was charged with having violated Section 1310.[1]

A look at *Deering's Annotated Calfornia Codes,* the latest edition, shows the following: (a) As to present *Health & Safety Code Section* 1508:

> *"Prior law:* Former Section 1502 as added by stats. 1947 C.H.1462 § 2."

(b) As to present *Health & Safety Code* Section 1502:

> *"Former Section:* Former 1502, similar to present Section 1508, was added by stats. 1947 C.H.1462, and repealed by stats. 1973 C.H.1203 § 3."

---

[1]For the complete text of Health & Safety Code sections: 1310 (former); 1250 (former); 1508; 1502; see the appendix to this brief.

From the above-quoted history of *Health & Safety Code* Section 1508, it is seen that it was in effect in the *Health & Safety Code* of the State of California under the designation, "Section 1502" since September 1947 and that it was not repealed until 1975. Hence the argument of respondent's brief that *Health & Safety Code* Section 1508 supplanted former *Health & Safety Code* Section 1310, cannot stand, since both sections were in effect during the time the defendant allegedly violated *Health & Safety Code* Section 1310 (Section 1508 was in effect under the designation Section 1502).

Also the activities proscribed by former *Health & Safety Code* Section 1310 are significantly different when measured in the context of the instant case, than the activities proscribed by *Health & Safety Code* Section 1508. A comparison of the repealed *Health & Safety Code* Sections 1310 and 1250, with *Health & Safety Code* Sections 1508 and 1502, which respondent's brief contends re-enacts Sections 1310 and 1250, is convincing that the prosecution of petitioner is barred by the former *Health & Safety Code* Section 1310. As can be seen by looking at the two repealed sections in their entirety, nowhere does former *Health & Safety Code* Section 1310 refer to "home finding agencies" other than as it is used in Section 1250(a) with reference to "mentally disordered persons, mentally retarded persons, and other competent persons." Sections 1250(c), 1250(d), and 1250(e) are not encompassed within the terms of Section 1310. On the other hand, *Health & Safety Code* Section 1508 does incorporate within it via *Health & Safety Code* Section 1502 the word "home finding agency," but not the words "facility" or "hospital," as those words are defined in former *Health & Safety Code* Section 1250. Thus former *Health & Safety Code* Section 1310 as written and charged, does not involve the offense of operating a "home finding agency" but rather, a "facility" or a "hospital" as those terms are defined in former *Health & Safety Code* 1250(a) and (b), and of "caring for persons not related to him by blood or affinity within the second degree." None of these activities have been carried over in substantial form by *Health & Safety Code* Section 1508, as it is defined in *Health & Safety Code* Section 1502. For example, the word "facility" which appears in *Health & Safety Code* Section 1502 refers to a "family home care facility" as opposed to the use of the word in former *Health & Safety Code* Section 1250, wherein "facility" is defined as follows:

> "(a) 'Facility' means any hospital, institution boarding home or other place for the care of persons, home finding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, or mentally retarded persons and other incompetent persons."

CONCLUSION

Thus, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division 1.

Respectfully submitted,

DAVID SILVERTON
Attorney at Law

Attorney for Petitioner

APPENDIX

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1250

§ 1250.

As used in this chapter:

(a) 'Facility' means any hospital, institution, boarding home or other place for the care of persons, homefinding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, mentally retarded and other incompetent persons.

(b) 'Hospital' means any institution, place, building, or agency which maintains and operates organized facilities for one or more persons for the diagnosis, care, and treatment of human illness, including convalescence and including care during and after pregnancy, or which maintains and operates organized facilities for any such purpose, and to which persons may be admitted for overnight stay or longer. 'Hospital' includes sanitarium, nursing home, and maternity home.

(c) 'Institutions, boarding homes, and other places for the care of persons' are facilities which provide non-medical board, room and care, or board and care or room and care.

(d) 'Homefinding agencies' means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption.

(e) 'Establishments and institutions for mentally disordered persons, and other incompetent persons' include every hospital, sanitarium, boarding home, or other place receiving or caring for any of the persons enumerated in this subdivision."

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

§ 1310. Persons, entities, and activities subject to license requirement.

No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

CALIFORNIA HEALTH AND SAFETY CODE SECTION § 1502

§ 1502. Definitions

As used in this chapter, "community care facility" means any facility, place, or building which is maintained and operated to provide nonmedical residential care, day care, or homefinding agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, or incompetent persons, and includes the following:

(a) "Residential facility" means any family home, group care facility, or similar facility determined by the director, for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual.

(b) "Day care center" means any facility which provides nonmedical care to persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis.

(c) "Homefinding agency" means any individual or organization engaged in finding homes, or other places for placement of persons of any age for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1508

§ 1508. Necessity of Licensing; temporary permit; county facilities

No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter.

No person, firm, partnership, association or corporation within the state shall provide specialized services within a community care facility in this state, without first obtaining a special permit therefor as provided in this chapter.

Except for a juvenile hall operated by a county, this section shall apply to community care facilities directly operated by a county. Each county operated community care facility shall comply with the standards established by the director for community care facilities.